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No. 97-

In the

Supreme Court of the United States

October Term, 1996

DEKALB STONE, INC.,

Petitioner,

v.

DEKALB COUNTY, GEORGIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 8, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Is the Eleventh Circuit correct in holding — contrary to a long line of this Court's precedents and to the decisions of almost every other Circuit — that an allegation of an arbitrary and irrational deprivation of state-created property interests states no cause of action under the substantive component of the Fourteenth Amendment's Due Process Clause?

2. Is the Eleventh Circuit correct in holding — again contrary to the decisions of this Court and almost every other Circuit — that even concededly arbitrary action by a state agency is outside the scope of the Fourteenth Amendment's prohibition on arbitrary government action if the action the agency has taken is "executive" rather than "legislative"?

LIST OF PARTIES

In addition to petitioner DeKalb Stone, Inc., and respondent DeKalb County, Georgia, the other parties to this proceeding are respondents Liane Levetan, Elaine Boyer, Gale Walldorff, Jacqueline B. Scott, Ken Davis, William C. Brown, Judy Yates and Porter Sanford, III, each in his or her official capacity, as the individuals constituting the Board of Commissioners of DeKalb County, Georgia; Douglas L. Bonds, in his official capacity as director of the DeKalb County Public Works Department; and Thomas O. Black, individually and in his official capacity as assistant director of the DeKalb County Public Works Department. The list of parties in the court of appeals was the same. In the district court action brought by petitioner the named defendants also included the DeKalb County Public Works Department, against which all claims were voluntarily dismissed without prejudice by stipulation of the parties, and Jack L. Smith, individually and in his official capacity as associate director of the DeKalb County Public Works Department, who could not be located for purposes of service of process.

RULE 29.6 LISTING

The parent companies of DeKalb Stone, Inc., are U.S. Aggregates, Inc., SRM Holdings Corp., and Southern Ready Mix, Inc. DeKalb Stone, Inc., has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 106 F.3d 956 (11th Cir. 1997) and is reprinted as Appendix A at page 1a. The opinion and order of the United States District Court for the Northern District of Georgia, Atlanta Division, is unreported and is reprinted as Appendix B at page 10a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered in this case on February 27, 1997. A timely petition for rehearing was denied on May 13, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution reads in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

The Eleventh Circuit has held that although the Fourteenth Amendment's Due Process Clause protects all of life, liberty and property from *procedurally* unfair deprivation, it protects from *substantively* arbitrary deprivation only life and certain liberties. The Due Process Clause, according to the Eleventh Circuit, leaves state-created property interests, including inter-

ests in real property, wholly unprotected, substantively, from executive action, no matter how arbitrary, so long as that action infringes neither speech, nor religion, nor any other special non-property right created by the Constitution itself. To see how this remarkable holding arose, we set forth the factual and procedural history of this litigation.

Petitioner DeKalb Stone, Inc. ("DeKalb Stone" or "petitioner") is the sublessee of a 183-acre tract of real property located in DeKalb County, Georgia. Since about 1902, this property ("the property" or "the Housworth Quarry") has been used as a rock quarry from which rock has been removed and extracted for commercial purposes. In 1956, DeKalb County ("the County") adopted a zoning ordinance under which the property was zoned "RA-150," Residential-Agricultural. In 1963, the DeKalb County Board of Commissioners rezoned the property as "R-100/R-85", Single Family Residential, and it has remained so classified until today.

The removal or extraction of rock for commercial purposes was and is prohibited under the R-100/R-85 classification. Under the DeKalb County zoning scheme, such activity is permitted only in an "M-2" Industrial District. But the County's zoning ordinance permits the continuation of any "nonconforming use," that is, a "legally existing use . . . which fails to comply with any provision of the [Zoning Ordinance] either at the effective date of the [Zoning Ordinance] or as the result of subsequent amendments." See Dekalb County Zoning Ordinance ("Zoning Ordinance") § § 27-1, 27-46. Such uses are permitted except that "no nonconforming use which has been discontinued for a continuous period of six (6) months shall be reestablished." Zoning Ordinance § 27-46.

In 1989, Alton Housworth ("the owner"), one of the owners of the property, who was then negotiating a lease

agreement for the property, applied to DeKalb County for a business license for the rock quarry on the property. The Development Director of the DeKalb County Public Works Department denied the permit on the ground that there was "insufficient evidence" that the "rock quarry operation being conducted on" the property was a "legal non-conforming" use. The owner appealed this decision to the Dekalb County Board of Appeals ("Board of Appeals" or "BOA"), to which he submitted evidence that the property had been quarried continuously since before the adoption of the original Zoning Ordinance in 1956. On November 8, 1989, the Board of Appeals overturned the administrative decision and issued an order stating that the "183 acre quarry [is] approved as a legal non-conforming use." The County did not appeal, and on November 20, 1989, this decision became final.

Despite this ruling, on March 6, 1990, the County issued the owner a "warning notice" commanding him to "refrain from blasting." On the same date the County's Associate Director of Public Works for the Development Department of the County Department of Public Works sent the owner a letter stating that "a development permit" — which is required by law only before the "commence[ment]" of "any proposed use" of a piece of land, see Zoning Ordinance §27-33 — was somehow "required" prior to engaging in the non-conforming use that had been approved by the Board of Appeals. On March 12, 1990, the Associate Director of Public Works sent the owner of the property a letter stating that the approval by the Board of Appeals of the nonconforming use permitted the use of the property only "to quarry rock by a hand process to produce rubble and decorative stone." The letter stated that "[b]lasting or any other quarrying processes or uses" were not part of the approved nonconforming use of the property.

On March 22, 1990, the owner replied through counsel that the BOA decision contained no such conditions or

restrictions, that the quarry operation had from time to time included blasting and crushing incidental to the removal of rock from the property, that the BOA decision permitted all uses incident to the quarrying operation to be continued, and that the Development Department was without jurisdiction to impose these additional conditions on the permitted nonconforming use. A second letter from the Development Department on April 10, 1990, claimed that it was "the responsibility of [the Development Department] to determine what quarrying operation existed prior to" the BOA decision.

The County took no further action for over four years. During that time, petitioner acquired a thirty-year sublease agreement with the owner to conduct rock quarry operations on the property. Between March 1992 and March 1995, petitioner committed to expend approximately $4 million in payments for its sublease, to purchase modern and environmentally efficient rock quarrying equipment for use at the Housworth Quarry, and to obtain various permits from the State of Georgia for its rock blasting and crushing operations on the property.[1]

On December 9, 1994, the County issued the owner another letter, which it described as "a formal warning notice" to refrain from future blasting. On December 27, 1994, the County issued and delivered to the owner two summonses from the Recorder's Court of DeKalb County. The first charged the owner with "operation of a rock quarry in violation of the BOA decision of 11/08/89." The second charged the owner with "operating a non-permitted rock quarry" and "failure to cease operation and remove non-permitted equipment."

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[1] Of this amount, petitioner has actually spent approximately $1 million. Approximately $3 million is payable under a contract for rock crushing services that have not yet been performed because of the actions challenged in the instant lawsuit.

The next day, December 28, 1994, in an attempt to cooperate with the county, petitioner, the sublessee of the property, filed an application for a development permit for "continuance of [the] existing rock quarry," while reserving its right to object to the application to it of the development permit requirement. Petitioner included in this application, in addition to the 183 acres at issue in this case, an additional seventy acres it had acquired adjacent to the property as a buffer zone designed to address the county's concerns about the harmful effects of the quarrying operation on the quarry's neighbors.

The County responded on January 11, 1995, by issuing a third Recorder's Court summons, this one for allegedly "expanding a legal non-conforming use," i.e., "blasting and rock crushing activities." The next day, the Environmental/Land Division of the DeKalb County Development Department issued a "Stop Order" commanding all work at the property to cease because of the failure to obtain a development permit.

On February 6, 1995, the Recorder's Court issued a decision. At the request of the prosecutor, it dismissed the first summons — that alleging "operation of a rock quarry." It found the owner not guilty of the charge made in the second summons, because "the defendant was legally authorized to operate a rock quarry pursuant to a decision by the DeKalb County Board of Zoning Appeals dated November 8, 1989."[2] As to the third summons, the Recorder's Court found the owner guilty of the charge of "expanding a legal non-

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[2] The Recorder's Court did find that the owner was not authorized to locate and operate heavy equipment at the quarry site, but found the owner not guilty because the charge was made in the conjunctive. Nothing about the placement of equipment at the quarry site, nor about the requirement of obtaining building permits for such equipment, is at issue before this Court.

conforming use (i.e. blasting and rock crushing)." The court found that the original zoning application that had been "'grandfathered' Industrial District, M2, For the Purpose of Mining; Removal or Extraction of Rock and Gravel" had been for the 183-acres at issue here. The court ruled, however, that the addition of the 70-acre buffer zone had been an expansion of the grandfathered area, and accordingly fined the owner $1000.00.

Four days later, on February 10, 1995, DeKalb County denied petitioner's pending application for a development permit, purportedly because the application covered both the 183-acre parcel and the 70-acre buffer zone. The letter by which the county denied the application stated that the *entire property* would have to be rezoned in order to permit the extraction of rock for production and processing of crushed stone. It further stated that, until the property was rezoned, all machinery and equipment that related to the removal or extraction of rock for production and processing of crushed stone had to be removed from the property. Because of this letter, petitioner stopped all rock quarry operations at the Housworth Quarry. As a result, petitioner is suffering operating losses of $15,000.00 per day.

Petitioner subsequently brought this § 1983 action in the District Court seeking *inter alia* declaratory and injunctive relief. Petitioner alleged that respondents' actions in imposing the development permit requirement, in sending the letters of March 12 and April 10, 1990, in issuing the December 9, 1994, warning notice, and in sending the February 10, 1995, letter which resulted in closure of the quarry violated its substantive rights under the Due Process Clause of the Fourteenth Amendment — that is, they deprived it of its property without due process of law — because they were "an abuse of administrative power" that "arbitrar[ily]," "capricious[ly]," and "without rational basis" interfered with

petitioner's vested property rights in conducting rock quarry blasting and crushing operations on the property pursuant to the Board of Appeals's 1989 decision. See Complaint ¶¶ 19, 20, 23, 31; see also Complaint ¶ 20 (letters of March 12, 1990 and April 10, 1990 were issued "willfully" and "unlawfully" for "partisan, political or personal reasons") .

In response to a motion by petitioner for a preliminary injunction, respondents argued *inter alia* that petitioner had no vested property right, and that, even if it did, respondents' actions could survive "rational basis" scrutiny because the BOA had approved only a "dimensional stone quarry" — a quarry for dimensional stone products such as granite curbing, decorative stone for headstones, and rubble. Respondents' Brief in Opposition to Petitioner's Motion for Preliminary Injunction 11.[3]

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[3] Respondents also argued *inter alia* that the district court lacked jurisdiction under the *Rooker-Feldman* doctrine because, prior to the commencement of this action, the owner of the property voluntarily dismissed an appeal of the Recorder's Court decision which was pending in the DeKalb County Superior Court. The legal significance of the dismissal of this state court appeal amounts to acceptance of what the respondents themselves describe as "the Recorder's Court's determination that [the owner] had illegally extended a nonconforming use," by including the 70-acre buffer zone in its application for a development permit. Respondents' 11th Cir. Brief at 4. *Rooker-Feldman* prevents lower federal courts from hearing an action "to reverse or modify the judgment" of a state court. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). This §1983 action, however, does not challenge or seek review of the Recorder's Court finding that, by inclusion of the 70-acre buffer zone, the owner was guilty of illegal expansion of the nonconforming use, nor does the §1983 complaint challenge the respondents' issuance of the summons that resulted in that finding. Rather, it alleges that, even accepting the Recorder's Court decision about the 70-acre buffer zone, respondents' actions here violated substantive due process. The *Rooker-Feldman* doctrine, therefore, is inapplicable. The district court, by reaching the merits of petitioner's motion for preliminary injunction, rejected respondents' *Rooker-Feldman* argument, and respondents did not renew it before the court of appeals.

The district court denied petitioner's motion. It expressed its view that petitioner had failed to state a claim upon which relief could be granted, see App. 40a-41a, but in the end chose to rest its decision on the ground that, at least "on the record as presented," petitioner had failed to demonstrate a substantial likelihood of success on the merits, because it had not shown that respondents' actions in preventing blasting and crushing at Housworth Quarry were "arbitrary and capricious." See App. 47a.

The court of appeals affirmed on a broader ground. See App. 5a-8a. It squarely held that the petitioner had failed to state a claim upon which relief could be granted. The court of appeals acknowledged that

> [s]ubstantive due process includes both the protections of most of the Bill of Rights, as incorporated through the Fourteenth Amendment, and also the more general protection against "certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."

App. 6a (citations omitted). It also explicitly assumed the existence of a property right, the right of the petitioner "to use its land as a nonconforming use under existing zoning laws." App. 6a & n. 5.

The court of appeals held, however, that no substantive due process cause of action can "exis[t] where an executive actor deprive[s] [an individual] of a state-created property right." App. 7a. It noted that petitioner's right to use its land, "as [with] property rights generally," was a "state-created righ[t]." App.6a. It further asserted that a county's actions in enforcing zoning laws were "executive," not "legislative" in character, because they involved "mere administrative

application of existing policies," rather than "policy-making." App. 7a (internal quotation marks and citations omitted). Citing its own *en banc* decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 898 (1995), the court of appeals held that "rights created by state law . . . are [not] protected by . . . substantiv[e] due process because substantive due process protects only rights created by the Constitution," App. 7a, and it held that *McKinney* and the Eleventh Circuit's subsequent decisions in *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383 (11th Cir. 1996), and *Boatman v. Town of Oakland*, 76 F.3d 341, 346 (11th Cir. 1996), demonstrated that a plaintiff does not state a substantive due process claim when he alleges even an "arbitrar[y] and capriciou[s]," App. 8a, "executive violation of a state-created right." *Id.* The court concluded that "[p]recedent and logic demonstrate that the cause of action pled by [petitioner] does not exist." *Id.*

REASONS FOR GRANTING CERTIORARI

The Eleventh Circuit has departed from this Court's basic teachings about the Fourteenth Amendment both by rejecting review for arbitrariness of governmental actions that infringe an individual's state-created property rights, and by insisting that, in any event, executive action is not subject to such review. This departure leaves the Eleventh Circuit at odds with courts of appeals for other circuits about the availability of a claim under the Fourteenth Amendment that an individual has been arbitrarily deprived of his property in violation of due process.

1. The Due Process Clause of the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurtado* v. *California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244 (1819)). "The touchstone of due process is

protection of the individual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974).

> [B]y barring certain government actions regardless of the procedures used to implement them, it serves to prevent governmental power from being "used for purposes of oppression."

Daniels v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856)).

Thus, although the Due Process clause provides *heightened* substantive protection only for certain particularly significant rights and interests, see *Reno* v. *Flores*, 507 U.S. 292, 302 (1993), this Court's cases from the time of the adoption of the Fourteenth Amendment make clear that one states a claim under the Due Process Clause with an allegation that a governmental action has wrought a deprivation even of a "lesser interest," *id.*, at 305, by an action that is "arbitrary and irrational." See, *e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); see also, *e.g.*, *Washington* v. *Glucksberg*, 117 S.Ct. ___, ___ (1997) (slip op. at 24) (even though "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause," nonetheless the "Constitution . . . requires . . . [the] assisted-suicide ban be rationally related to legitimate government interests.").

And, although this Court's cases address most prominently the scope of "liberty" protected by substantive due process — both in terms of rights and freedoms contained in the Bill of Rights and incorporated by the Due Process Clause, and in terms of "fundamental rights and liberty interests" that are unenumerated, see *Washington* v. *Glucksberg*, 117 S.Ct. ___,

___ (1997) (slip op. at 15); see also, *e.g.*, *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992); *Roe* v. *Wade*, 410 U.S. 113 (1973) — the Fourteenth Amendment *by its terms* protects "life," "liberty," *and "property."* See U.S. Const. Amend. XIV. Indeed, this Court has recently cautioned that the Constitution's protections of property should not "be relegated to the status of a poor relation." *Dolan* v. *City of Tygard*, 512 U.S. 374, 392 (1994) (comparing the treatment given the Takings Clause of the Fifth Amendment to the treatment given the provisions of the First and Fourth Amendments).

Consequently, this Court has routinely reviewed under the Due Process Clause the substance of governmental action that is alleged arbitrarily to infringe an individual's property interests. To give but one recent example, this Court's decision just last Term in *BMW of North America* v. *Gore*, 116 S.Ct. 1589 (1996), invalidated an unduly large punitive damages award on the ground that, because it was grossly excessive, it amounted to an arbitrary deprivation of property in violation of substantive due process. See *Gore*, 116 S.Ct. at 1595 (when an award is "grossly excessive" in relation to the State's legitimate interests in punishment and deterrence, it "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment"); see also *TXO Products Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 453 (1993) (plurality opinion) (hearing, although rejecting on the merits, a claim that a particular punitive damages award "is so excessive that it must be deemed an arbitrary deprivation of property without due process of law"); *id.* at 480 (O'Connor, J., dissenting) ("[i]t is . . . common ground that an award may be so excessive as to violate due process").

To give another example, in *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 636-641 (1993), this Court four Terms ago addressed a claim by an

employer that its property was taken in violation of substantive due process when liability was assessed against it under the Multiemployer Pension Plan Amendments Act of 1980. See *Id.*, at 636-641. The Court upheld the application of the statute against the employer only after concluding that "the imposition of . . . liability [was] rational," 508 U.S. at 638, and not "arbitrary." *Id.*, at 637. See also, *e.g.*, *Bennis* v. *Michigan*, 116 S.Ct. 994, 998 (1996) (explaining that petitioner brought a substantive, not procedural, due process challenge to the forfeiture of her car based on its use without her knowledge by her husband to engage in sexual activity with a prostitute); *id.* at 1009 (Stevens, J., dissenting) (finding that "the seizure constituted an arbitrary deprivation of property without due process of law"); *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214, 221-222 (1986) (reviewing for arbitrariness as a matter of "substantive due process" governmental action alleged to violate a student's assumed property right in continued enrollment); *Williamson* v. *Lee Optical*, 348 U.S. 483, 486-488 (1955) (reviewing for rationality a state statute alleged unconstitutionally to infringe opticians' "right to do business"); *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834-835 n. 3 (1987) (describing the standard for "due process challenges" where "regulation of property is at issue"); *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69-70 (1937) (Brandeis, J.) (finding that well owners had met their burden of showing that a limitation on the allowable production of gas was unconstitutional because it bore "no reasonable relation" to legitimate governmental purposes and it "arbitrar[ily]" deprived them of their property); *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188-189 (1928) (striking down application of a zoning restriction on the use of a particular piece of property under the Fourteenth Amendment's Due Process Clause because such a restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or

general welfare").[4]

These cases makes clear that an allegation of an arbitrary deprivation of property states a claim under the Due Process Clause of the Fourteenth Amendment, entirely apart from any alleged deprivation of a property entitlement without *procedural* due process. This is not to say that it will necessarily be easy in a particular case to demonstrate that a governmental action was indeed "arbitrary in the constitutional sense." *Collins* v. *Harker Heights*, 503 U.S. 115, 128-129 (1992) (failure to "guarantee municipal employees a workplace that is free of unreasonable risks of harm," even if tortious under state law, not arbitrary in the constitutional sense). But "the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989); *Nollan*, 483 U.S. at 833 n. 2, 837 (government cannot "unilateral[ly] . . . alter property rights" and an attempt to get a property owner to yield such rights in order to obtain an unrelated government permit amounts to nothing more than unconstitutional "'extortion'"). The Due Process Clause provides protection for life, liberty and property, and the prohibition against arbitrary deprivations of those interests is — and since the Fourteenth Amendment's adoption has been — the bedrock of that protection.

2. The Eleventh Circuit departed first from this Court's basic teaching about the Fourteenth Amendment when it

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[4] Although the Court in the years since *Nectow* has been more deferential in determining whether there is a legitimate public purpose for governmental action, see, e.g., *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240-241 (1984), as the other cases cited in the text make clear, the proposition that property-limiting governmental action that is not rationally related to a legitimate governmental purpose may violate the Fourteenth Amendment has never been renounced.

reasoned that petitioner could not bring a claim because "any property right possessed by [petitioner] was a state-created . . . right." App. 6a. The court of appeals concluded that "rights created by state law" are not "protected by . . . substantive[] due process." App. 7a. Rather, it held that "substantive due process protects only rights created by the Constitution." *Id.*

This conclusion flies in the face of this Court's repeated and explicit holdings. This Court has made clear that

> [p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. *Roth*, 408 U.S. 564, 577 (1972).

The Eleventh Circuit simply turned this legal principle on its head. The court of appeals *appears* to have been confused by the statement of Justice Powell, concurring in the Court's unanimous opinion in *Regents of the University of Michigan* v. *Ewing*, when he wrote (for himself alone) that,

> [w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution.

Ewing, 474 U.S. 214, 228 (1986) (Powell, J., concurring). See App. 7a (citing *McKinney* v. *Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 898, which in turn cited Justice Powell's concurrence in *Ewing*). When Justice Powell's statement is read in context, it is clear, however, that

he meant only that it was a question of federal constitutional law (rather than of state law) whether a particular interest was subject to *heightened judicial scrutiny* under the Due Process Clause. See *Ewing*, 474 U.S. at 228 (Powell, J., concurring) (going on to say that "[t]he determination that a substantive due process right exists is a judgment that '"certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."' [*Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (opinion of Powell, J., for a plurality)] quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)."). Justice Powell, of course — like all the current Members of this Court — routinely joined due process opinions, including the opinion for the Court in *Ewing*, that examined governmental action that affected state-created property rights to ensure that it was not arbitrary.

Of course *some* state-created interests are not protected as "property" within the meaning of the Due Process Clause. See, e.g., *Ewing*, 474 U.S. at 222 (opinion of the Court) (only *assuming* that a contract gave a student a "constitutionally protected property interest" in continued enrollment in a state program of higher education). But in the instant case, what is at issue is not some interest with only a dubious claim to status as "property," such as the alleged right to a place in a medical school class. See *Board of Curators* v. *Horowitz*, 435 U.S. 78, 91-92 (1978). What is at issue is petitioner's right to make use of his real property. See *Nollan*, 483 U.S. at 833-834 n. 2 (right to use one's real property as one wishes, subject only to non-arbitrary government regulation — there, to "build on one's property" within the bounds of rational zoning restriction — is a "property righ[t]" that cannot remotely be described as a "governmental benefit").

3. The Eleventh Circuit departed from this Court's basic teachings about the Fourteenth Amendment in a second way, by ruling that executive action — which it has defined as

action that involves "mere administrative application of existing policies" rather than "policy-making" — is not subject to review for arbitrariness. An action is characteristically "executive," according to the Eleventh Circuit, if it "appl[ies] to a limited number of persons (and often only to one person)." *McKinney*, 20 F.3d at 1557 n. 9. "Legislative acts, on the other hand, generally apply to a larger segment of — if not all of — society." *Id.*

In *Ex parte Virginia*, 100 U.S. 339 (1879), this Court explained that "[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." 100 U.S. at 346. The Court explained that the provisions of the Fourteenth Amendment apply to *every* "agency of the State, or of the officers or agents by whom its powers are exerted." *Id.*, at 347. This Court made clear that "the prohibitions of the Fourteenth Amendment" apply in full to actions by the judicial and executive authorities of the States, and not merely to their legislatures:

> They [the prohibitions] have reference to actions of the political body denominated a State, *by whatever instruments or in whatever modes that action may be taken*. A State acts by its legislative, *its executive*, or its judicial authorities. It can act in no other way.

Id. at 346-347 (emphasis added). See also U.S. Const. Art. VI, §3 (oath required by Supremacy Clause of a state's executive, judicial *and* legislative officers).

And indeed, the Fourteenth Amendment's restrictions have routinely been enforced by this Court to invalidate the *application* of law, as well as its adoption, in cases dating back to the time of the amendment's ratification: Thus in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), this Court concluded

that the Constitution did not "mean to leave room for the play and action of purely personal and arbitrary power," and it concluded that an abuse of power in the *administration* of a facially unexceptionable statutory scheme — in that case, an abuse in the form of racial discrimination — was actionable under the Fourteenth Amendment. See 118 U.S. at 373-374.

This teaching, of course, remains a central part of the law today. Consistent with it, this Court has reviewed not only legislative, but "executive," action to determine whether it worked an arbitrary deprivation of property in violation of substantive due process — that is, to determine whether a challenged action that deprived an individual or corporation of its property (or of the use of that property) was rationally related to a legitimate purpose, or was, rather, altogether void as a substantive matter and not merely defective for want of a procedurally adequate hearing, or for want of suitable compensation. For example, in *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. at 636-641, the Court heard a claim by an employer that its property was taken arbitrarily in violation of substantive due process when a multiemployer pension trust fund applied the Multiemployer Pension Plan Amendments Act of 1980 to it and issued an assessment against it of over $268,000.00. The Court specifically held that the trustees of the trust fund acted in "an enforcement capacity," like that of "a federal agency administrator who determine[s] violations of . . . law and assesse[s] penalties under [a] statute." *Id.* at 619. The Court nonetheless went on to examine the substantive due process allegation, concluding that "the imposition of . . . liability [was] rational," *id.* at 638, and not "arbitrary." *Id.* at 637. See also, *e.g.*, *Regents of the University of Michigan* v. *Ewing*, 474 U.S. at 222 (reviewing action of the Promotion and Review Board of the University of Michigan in dropping a particular student from a program of higher education to determine whether it arbitrarily denied the student a claimed property

right in continued enrollment).

Indeed, this Court's decision in *Nollan* v. *California Coastal Commission* can best be understood as a successful substantive due process challenge to arbitrary (in that case, extortionate) executive action. For there the Coastal Commission — analogous to the Development Department in the instant case — did not directly "take" any property of the Nollans. Rather, it sought to require the Nollans to transfer a property right as a condition of issuing a building permit. Although the Coastal Commission undoubtedly had fairly broad authority to regulate the use of the Nollans' land, see 483 U.S. at 833 n. 2 — as the Development Authority has considerable authority to regulate the land at issue here — *Nollan* held that that authority to restrict building could not be exercised in an "extortion[ate]," *id.* at 837, — that is, in an arbitrary — way, in which there is a "lack of nexus between the condition and the original purpose of the building restriction." *Id.* In such circumstances, the Court held, the refusal to issue a building permit "is not a valid land use regulation." *Id.*

Furthermore, when the Constitution imposes limits uniquely applicable to state *legislation*, it says so. For example, the Impairment of Contracts Clause in Section 10 of Article I of the Constitution provides that "No State shall . . . pass any . . . Law impairing the obligation of contracts." U.S. Const. Art. I, § 10. This Court has consequently construed that provision, *unlike* the Due Process Clause of the Fourteenth Amendment, to apply only to legislative acts — the passage of statutes, referenda and state constitutional provisions. See *Tidal Oil* v. *Flanagan*, 263 U.S. 444, 451-452 (1924). Indeed, the very distinction in the reach of federal authority that the Eleventh Circuit has posited here — between legislative "policymaking" and executive "implementation" — has recently been held by this Court to be "interesting," but

ultimately constitutionally irrelevant. See *Printz* v. *United States*, 117 S.Ct. ___, ___ (1997) (slip op. at 28-30); see also *id.* at ___ (slip op. at 28) ("[e]xecutive action that has utterly no policymaking component is rare").

Finally, the purported distinction — in which substantive due process constraints evaporate once one concludes that a government action "appl[ies] to a limited number of persons," or, indeed, "only to one person," see App. 7a; *McKinney*, 20 F.3d at 1557 n. 9 — stands over a century of constitutional jurisprudence on its head. For a central mission of the Due Process Clause has always been to guarantee, as an aspect of the rule of law, that government never act to an individual's detriment *except* pursuant to a general rule that is "not a special rule for a particular person or a particular case." See *Hurtado* v. *California*, 110 U.S. at 535. Indeed, the rule adopted by the Eleventh Circuit exempts from due process scrutiny the very category of government action — executive action — that since Magna Charta has been understood in Anglo-American law to be most in need of judicially enforceable restraint to avoid substantive arbitrariness. See *id.* at 531.

The Eleventh Circuit appears to have taken the "executive"/"legislative" distinction from this Court's opinion in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). See *McKinney*, 20 F.3d at 1557 n. 9. But this opinion — which said, quite correctly, that "[d]ecisions of the Executive Branch, however serious their impact, do not *automatically* invoke due process protection" — was making clear only that not all erroneous decisions of government implicate liberty or property interests that are protected by the Due Process Clause. See *Greenholtz*, 442 U.S. at 7-8 (emphasis added) (quoted language contained in a discussion of whether "the . . . claimed interest" amounted to "a protectible right"). There was no suggestion there at all

that the restrictions of the Due Process Clause apply any less to executive than to any other kind of State action.[5]

4. Unsurprisingly, the Eleventh Circuit's conclusion — that an allegation that an executive action has arbitrarily denied an individual of a state-created property interest fails to state a claim under the Fourteenth Amendment — conflicts with the conclusion reached by every other Court of Appeals. Every Circuit cautions that the federal courts do not sit as boards of zoning appeals, and that ordinary disputes between, for example, property owners and local zoning officials will not rise to the level of a constitutional violation. But although there is debate among the other Circuits about what interests are sufficient to trigger the property protection of substantive due process, every other court of appeals except one has held that an allegation of an arbitrary and capricious denial of sufficiently substantial property interests — and particularly of "state-created land use right[s]," App. 8a — by action that is "executive" within the Eleventh Circuit's definition *will* state a claim of a substantive due process violation under the Fourteenth Amendment. And even the one Circuit that might

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[5] The court of appeals's opinion *might* be read to suggest that *substantive* due process review is somehow not available because *procedural* due process is. See App. 7a. This Court *has* held that the procedural due process requirements that are applicable to *executive* action that deprives an individual of a right to liberty or property are *not* applicable to legislative action — action adopting "a rule of conduct [that] applies to more than a few people" — that has that same effect. See, *e.g.*, *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). This does not mean, however, that only substantive, and not procedural, due process applies to state legislatures, but only that an individual's interests receive all the process they are due by state legislative procedures. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982). And in any event, there is no reason that a limitation of procedural due process in the legislative context (with a retention only of substantive due process protection), would imply a limitation on substantive due process in the executive context (with a retention only of procedural due process protection).

not have entertained petitioner's claim, the Ninth Circuit, has stated a different rule that is itself at variance with that of the Eleventh Circuit.

In *Ortiz de Arroyo* v. *Barcelo*, 765 F. 2d 275 (1st Cir. 1985), the First Circuit reviewed a challenge to executive action of the Governor of Puerto Rico that prohibited the issuance of permits for any building or structure on a particular parcel of real property. "The plaintiffs averred that the land use restriction was arbitrary and capricious, [and] was unrelated to any reasonable governmental purpose." *Id.* at 278. The court of appeals held that the plaintiffs had stated a cause of action on which relief could be granted. *Id.* at 279-281. This conclusion was necessary to the result in the case, which was to affirm an award under 42 U. S. C. § 1988 of attorney's fees to the plaintiffs as "prevailing parties" in light of a settlement in which the land use restriction was lifted. See *id.* at 281-283. See also *Roy* v. *City of Augusta*, 712 F.2d 1517, 1522-1524 (1st Cir. 1983) (plaintiff stated a substantive due process claim upon which relief could be granted by alleging that the defendants deprived him of his business license and his business by taking actions that were "entirely arbitrary" and "without reasonable sanction" in "disregard[ing] and subvert[ing]" the Maine Supreme Judicial Court's judgment that plaintiff was entitled to that license); *PFZ Properties* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), cert. dismissed as improvidently granted, 503 U.S. 257 (1992) (describing the narrow circumstances under which a deprivation of a property interest will rise to the level of a substantive due process violation).

On its facts, the Second Circuit's decision in *Brady* v. *Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) — in which the court of appeals reversed a grant of summary judgment in favor of municipal defendants when it found that "the plaintiffs did produce sufficient evidence to support their . . . substantive

due process clai[m]" — is identical in relevant respects to the instant case. In that case,

> the owner was obliged by the local authorities to seek a permit for commercial use of his property, whereas his position was that his property was already zoned for commercial use, that no permit was required, and that the local decision obliging him to seek a permit was wholly unjustified.

See *RRI Realty Corp.* v. *Incorporated Village of Southampton*, 870 F.2d 911, 917 (2d Cir.), cert. denied, 493 U.S. 893 (1989) (describing the case). The Second Circuit held that "the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions." *Brady*, 863 F.2d at 215. And, after looking to state law to see whether the plaintiffs had a "protectible" property interest under this Court's procedural due process cases — because "property interests . . . are not created by the Constitution," *id.* at 212 (quoting *Roth*, 408 U.S. at 577) — the Second Circuit concluded that the plaintiffs had adduced sufficient evidence to survive the defendants' motion for summary judgment because "a trier of fact could conclude that there was no 'rational basis'" for the actions of the officials of the Town. *Id.* at 216. See also *Southview Associates, Ltd.* v. *Bongartz*, 980 F.2d 84, 96 (2d Cir. 1992), cert. denied, 507 U.S. 987 (1993) (holding, in a case involving a challenge to the prohibition of a vacation-home development on a particular piece of property in Vermont, that "it is well established that a government land use decision may give rise to a substantive due process violation if the decisionmaking process is arbitrary and capricious");[6] *Zahra* v. *Town of Southold*, 48 F.3d 674, 679-

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[6] The court of appeals in *Southview Associates* distinguished "a second, less developed approach, one to which the Supreme Court has yet to give its imprimatur," under which "regulation that goes so far that it has the

682 (2d Cir. 1995) (describing the requirements in the Second Circuit for a successful substantive due process challenge to allegedly arbitrary local land use decisions); *RRI Realty Corp.*, 870 F.2d at 914-918 (same).[7]

The Third Circuit has held that

> in the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

DeBlasio v. *Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 593 (3d Cir.), cert. denied, 116 S.Ct. 352 (1995). In *DeBlasio*, the Court concluded that the plaintiff had adduced sufficient evidence to defeat a motion for summary judgment on his claim that a town Building and Zoning Official had wrongfully cited him for expansion of a non-conforming use, and that the Zoning Board of Adjustment had made wrongful administrative decisions upholding that citation and denying plaintiff a variance. The court concluded that "'not all property interests worthy of procedural due

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same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause." *Id.* at 96 (quoting *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 197 (1985)).

[7] The Second Circuit held in 1992 that a substantive due process claim based on arbitrariness would not be ripe until there was a "final decision" within the meaning of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 197 (1985). See *Southview Associates*, 980 F.2d at 96-97. The Tenth Circuit reached a similar conclusion in 1989. See *Landmark Land Company of Oklahoma, Inc.* v. *Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989). As this Court made clear this Term, however, where a land use decision applies to a single parcel of land, the finality requirement of *Williamson* is no bar to adjudication. See *Suitum* v. *Tahoe Regional Planning Agency*, 117 S.Ct. 1659, 1667 (1997).

process protection are protected by the concept of substantive due process,'" but that the plaintiff's "state-created property interes[t]," *id.* at 598, in ownership of land was so protected.

> [I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 601. See also, *e.g.*, *Neiderhiser* v. *Borough of Berwick*, 840 F.2d 213, 218 (3d Cir.), cert. denied, 488 U.S. 822 (1988) (lessee who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that its exemption application was arbitrarily and irrationally denied, in that case on the basis of the content of movies it rented); *Bello* v. *Walker*, 840 F.2d 1124, 1129-1130 (3d Cir. 1988) (allegation that building permit was denied for "partisan political or personal reasons unrelated to the merits of the application" sufficed to state a claim that denial was "arbitrary, irrational, or tainted by improper motive" in violation of substantive due process).[8] Indeed, one member of the Third Circuit has written separately to express his view that the decisions of his Circuit applying substantive due process analysis to non-legislative acts conflict with the Eleventh Circuit decision in *McKinney*, relied on by the court of appeals below. See *Homar* v. *Gilbert*, 89 F.3d 1009, 1028 (3d Cir. 1995), rev'd on other grounds *sub nom. Gilbert* v. *Homar*, 117

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[8] The divergence of opinion among the courts of appeals about precisely which property interests are protected under substantive due process is also a question on which the lower courts are in pressing need of guidance. See *DeBlasio*, 53 F.3d at 598 ("Our substantive due process inquiry is rendered even more difficult by the paucity of Supreme Court guidance.").

S.Ct. ___ (1997) (Alito, J., concurring in part and dissenting in part).

The Fourth Circuit, too, recognizes the cause of action rejected by the Eleventh Circuit. For example, in *Scott* v. *Greenville County*, 716 F.2d 1409 (4th Cir. 1983), a developer brought a substantive due process action after he was denied a building permit for low-income apartments, likely to be occupied by members of a racial minority. The development was permitted under the existing zoning scheme, but the permit was withheld by a County administrative official on the specific, extraordinary, and unlawful instruction of the County Council, an instruction that "was directed solely to" that one developer. *Id.* at 1420; see also *id.* at 1420 n. 16 (explicitly rejecting characterization of the action as "legislative"). The court of appeals found that the developer "held a cognizable property interest, rooted in state law, to which federal due process protection extended." *Id.* at 1418-1419. It found that "[a]rbitrariness, abuse of discretion, caprice or unfairness" in the permit-processing action of the County did give rise to a claim under the Due Process Clause, and that the plaintiff had produced sufficient evidence to require trial. See *id.* at 1419, 1421. See also *Gardner* v. *City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (deprivation of a cognizable property interest that is arbitrary and capricious will violate substantive due process).[9]

The Fifth Circuit has also held such claims cognizable. See *Russell* v. *Harrison*, 736 F.2d 283, 288 (5th Cir. 1984) (complaint alleging an arbitrary and capricious deprivation of

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[9] *Gardner* concluded, applying *Roth*, that there could be a protected property interest only where state officials "lac[k] all discretion" with respect to the claimed property. See *id.* at 68. It appears that this holding alone is in conflict with that of the Eleventh Circuit, because actors with no discretion will always be "executive" officials within the Eleventh Circuit's definition.

a property interest states a cause of action under the Due Process Clause). Indeed, it has permitted a claim of a substantive due process violation to go to the jury when a plaintiff presented sufficient evidence of an "arbitrary and capricious" executive deprivation of a "protected property interest" created by state law outside the real-property context, an entitlement to vested tenure at a state university. See *Honore* v. *Douglas*, 833 F.2d 565, 568 (5th Cir. 1987). See also *Williams* v. *Texas Tech University Health Sciences Center*, 6 F.3d 290, 294 (5th Cir. 1993), cert. denied, 510 U.S. 1194 (1994) ("To state a substantive due process claim a plaintiff must show that the government's deprivation of a property interest was arbitrary or not reasonably related to a legitimate governmental interest.").

The Sixth Circuit explicitly upheld a judgment on "substantive due process" grounds where there was sufficient evidence to support the jury's finding that a teacher's interest in government employment had been infringed in an "arbitrary and capricious" way. See *Gutzwiller* v. *Fenik*, 860 F.2d 1317, 1328-1329 (6th Cir. 1988) (substantive due process provides an independent ground for invalidation of a decision based on an impermissible consideration such as gender); see also *Wilkerson* v. *Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (affirming substantive due process judgment against state official who, acting in concert with others on a regulatory board, intentionally misapplied state licensing law to keep a competitor from obtaining an occupational license).

The Seventh Circuit has observed that

> [t]he Supreme Court has not yet provided clear guidance on whether the arbitrary deprivation of a property interest will implicate substantive due process when the plaintiff does not challenge the constitutionality of the statutory scheme,

Kauth v. *Hartford Insurance Company of Illinois*, 852 F.2d 951, 956 (7th Cir. 1988), but that court has heard such claims, see *Clark* v. *Winnebago County*, 817 F.2d 407, 408-409 (7th Cir. 1987) (deciding on the merits a substantive due process challenge to an adverse zoning decision), and its recent cases hold that, in some circumstances at least, such claims remain valid. See *Polenz* v. *Parrott*, 883 F.2d 551, 558 (7th Cir. 1989).[10] The Seventh Circuit has also made clear that both real property and what it describes as a separate category of "state-created property interest[s]," *id.*, are protected by substantive due process. *Id.* at 558-559.

The Eighth Circuit likewise recognizes this cause of action. It has held that "denial of a building permit under some circumstances may give rise to a substantive due process claim." *Littlefield* v. *City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986). In *Littlefield*, the claim was essentially the same as the claim subsequently vindicated in *Nollan*. The court of appeals, relying on substantive due process,

> h[e]ld . . . that appellants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily and imposed an unconstitutional condition on the granting of [a building] permit.

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[10] The Seventh Circuit has held, in reliance on *Parratt* v. *Taylor*, 451 U.S. 527 (1981), that a substantive due process claim cannot be brought if adequate state remedies are available. See *Kauth*, 852 F.2d at 958; see also *Schaper* v. *City of Huntsville*, 813 F.2d 709, 717-718 (5th Cir. 1987) (suggesting the same thing in a panel opinion that has subsequently not been followed by the Fifth Circuit). Other courts of appeals have not applied *Parratt* in this way. See, *e.g.*, *Littlefield* v. *City of Afton*, 785 F.2d 596, 607-608 (8th Cir. 1986) (*Parratt* does not bar claims of violations of substantive constitutional rights, including the substantive due process right not to be deprived of property arbitrarily, as well as the substantive due process rights contained in the Bill of Rights provisions incorporated into the Due Process Clause of the Fourteenth Amendment).

See *id.*

The Ninth Circuit appears recently to have rejected substantive due process challenges to government infringements of property rights altogether. Concluding that "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited," *Armendariz* v. *Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the en banc court, relying on this Court's decisions in *Graham* v. *Connor*, 490 U.S. 386 (1989), and *Albright* v. *Oliver*, 510 U.S. 266 (1994), held that claims of arbitrary deprivation of property should be heard under the "public use" requirement of the Takings Clause made applicable to the states through the Due Process Clause, see *id.* at 1319-1321 (citing *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241 (1984)), rather than under the substantive component of the Due Process Clause simpliciter. See *id.* But this decision, too, conflicts with that of the Eleventh Circuit. First, the Eleventh Circuit has held that substantive due process claims *are* cognizable for deprivations of (constitutionally-created) property by (legislative) officials. *Armendariz* seems to put an end to that theory in the Ninth Circuit. On the other hand, the Eleventh Circuit has made clear that the Takings Clause does not provide an alternative ground for petitioner's arbitrariness claim. See App. 5a n. 4 ("This is not a takings case . . . because [petitioner] never argued that it was deprived of all economic use of its property."). Yet that claim could clearly be brought under the Takings Clause in the Ninth Circuit.

The Tenth Circuit is like most of its sister Circuits in recognizing the possibility of a substantive due process claim for arbitrary executive deprivation of a protected property interest. See, *e.g.*, *Landmark Land Company of Oklahoma, Inc.* v. *Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989) (stating, in a case challenging the actions of a city manager in denying

building permits, that the plaintiff "could recover on its substantive due process claims if it could show [the defendant] City deprived it of property in an arbitrary fashion") (citing *Usery* v. *Turner Elkhorn Mining*, 428 U.S. 1, 15) (1976)).

Finally, the D.C. Circuit has invalidated as unconstitutionally arbitrary an executive action that affected a state-created property right. See *Shenk* v. *Zoning Commission of the District of Columbia*, 440 F.2d 295, 296-298 (D.C. Cir. 1971) (holding that permission to build garden-type apartments was arbitrarily withheld by the Zoning Commission in violation of the Constitution).

5. This case presents an ideal vehicle for addressing this pervasive split in authority among the Circuits. First, this case cleanly implicates that split. This case involves an interest in the use of real property. Consequently, the Court need not be detained by the preliminary question whether some contractually-created interest is sufficiently strong to be treated as "property" for Fourteenth Amendment purposes.[11] In addition, this case presents no preliminary question about the sufficiency of the evidence to demonstrate that the respondents' actions were unconstitutionally arbitrary. The Court of Appeals did not reach the question whether petitioner had adduced sufficient evidence of arbitrariness to demonstrate a probability of success on the merits, but held that, assuming the allegations of the complaint were true, petitioner had failed to state a claim upon which relief could be granted. This case thus presents the unadorned question whether a cause of action for an arbitrary executive deprivation of state-created property exists under the Due Process Clause. Should the Court agree

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[11] In addition, the fact that the Court of Appeals reached its decision by assuming the existence of a property right — an assumption this Court, too, would be bound to make on review of the decision below — would independently permit this Court to avoid that preliminary issue.

with us about the availability of this cause of action, it could then leave the facts of this case to be assessed on remand under the appropriate standard.

Second, there are no other preliminary issues counselling denial of the petition for certiorari. For example, this case is not "interlocutory" in the sense that there is any possible future action by the lower courts in this case that could obviate this Court's need to address the issue. Because the Court of Appeals found that petitioner had failed to state a claim upon which relief could be granted, the decision below is effectively the end of its substantive due process claim.

Finally, the split in authority is persistent. This is not the first case since *McKinney* in which the Eleventh Circuit has ruled against a substantive due process claim because the governmental action was executive and the infringed interest was created by state law. See *C.B.* v. *Driscoll*, 82 F.3d 383, 387 (11th Cir. 1996); see also *Boatman* v. *Town of Oakland*, 76 F.3d 341, 346 (11th Cir. 1996).

CONCLUSION

This is not the first time that this Court has seen a court of appeals take such an obviously erroneous departure from the accepted precepts of constitutional law. Cf. *Soldal* v. *Cook County*, 506 U.S. 56 (1992) (reversing a decision of the Seventh Circuit that concluded that the Fourth Amendment prohibition on unreasonable "seizures" somehow did not protect against a "'pure deprivation of property,'" "absent interference with privacy or liberty"). As it did in *Soldal*, this Court should grant review because, in making this departure, the Eleventh Circuit has ignored the text and history of the Constitution and of its interpretation by this Court and, as a consequence, has rendered a decision in conflict with those of other Circuits. The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 8, 1997

APPENDIX A

DeKALB STONE, INC., d.b.a.
Houseworth Rock Quarry,
Plaintiff-Appellant,

v.

COUNTY OF DeKALB, GEORGIA, a political subdivision of the State of Georgia; Liane Levetan; Elaine Boyer; Gale Walldorff; Jackqueline B. Scott, et al.,
Defendants-Appellees.

No. 95-9578

United States Court of Appeals,
Eleventh Circuit

February 27, 1997.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Appellant DeKalb Stone, Inc. (DeKalb Stone) seeks to enjoin DeKalb County from enforcing zoning laws, asserting

that enforcement constitutes an arbitrary and capricious violation of its substantive due process right. The district court denied Appellant's motion for preliminary injunction, finding that a county executive's arbitrary and capricious deprivation of a state-created property right does not violate substantive due process under the Fourteenth Amendment. We affirm.

I. BACKGROUND

Appellant and its predecessors have operated some type of rock quarry on their property since the turn of this century. In 1956, the County zoned the property agricultural-residential. In 1963, the property was rezoned for single family residential use. No further official action was taken regarding this property until 1989, when Appellant sought a business license to operate the quarry. The County denied the license because of a lack of evidence that the quarry was a legal nonconforming use of the property. Appellant appealed to the Board of Zoning Appeals (BOA), which found sufficient evidence that the quarry was a legal nonconforming use. In a one-sentence opinion, the BOA held:

> This is to advise that the Board of Appeals, at its meeting of 11/08/89, reached the following decision on the above application: Approved appeal; overturned administrative decision that quarry operated at 7262 South Goddard Road is not a legal non-conforming use (183 acre quarry approved as a legal non-conforming use).

Upon receiving this determination, Appellant invested in equipment and construction, preparing to blast and crush rock as part of a modernized quarrying operation. Notably, neither party appealed the BOA's finding of a legal nonconforming

use.[1]

In 1990, after residents complained about the blasting, the County warned Appellant to stop blasting until it obtained a development permit. The County explained that the blasting and crushing exceeded the scope of the nonconforming use approved in the BOA decision. In its negotiations with the County over the development permit, Appellant agreed to purchase a buffer zone of 70 acres around the quarry. In an apparent change of course, the County then served Appellant with three summonses to Recorders Court for violations of zoning regulations. One summons charged that Appellant illegally expanded the nonconforming use by purchasing the 70-acre buffer zone. The County ultimately ordered Appellant to stop work in the quarry.

Despite the fact that Appellant never intended to quarry the 70-acre buffer zone, the Recorders Court found that the purchase constituted an illegal expansion of the nonconforming use and fined Appellant $ 1000. Shortly after the Recorders Court decision was issued, the County denied Appellant's application for a development permit. Appellant did not appeal the denial of the development permit to the BOA, but it did petition the Georgia Superior Court for a writ of certiorari from the Recorders Court decision. Although the

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[1] It is only speculation and has no bearing on the issues in this appeal, but we note that the parties may have lacked incentive to appeal because each party perceived that it had prevailed. The County might have believed the quarry would be limited to the hand picking of dimensional stone while DeKalb Stone might have believed that it had approval to conduct general quarrying operations, including unrestricted blasting and crushing. A factual dispute remains in this case as to whether Appellant was engaging in blasting and crushing prior to the BOA decision so that such activities would have comprised part of the legal nonconforming use sanctioned by the BOA.

Georgia Superior Court granted the writ, Appellant voluntarily dismissed the state case and filed this federal action.

Appellant now seeks a declaratory judgment that it has the right to continue its blasting and crushing as part of the quarry's legal nonconforming use. In addition, it seeks a preliminary injunction barring the County from enforcing the zoning regulations.[2] The district court denied Appellant's motion for preliminary injunction on the ground that Appellant did not show a substantial likelihood of success on the merits because no substantive due process claim is cognizable when an executive official arbitrarily and capriciously deprives a plaintiff of a state-created property right.[3]

II. STANDARD OF REVIEW

This Court has recently summarized the mixed standard to be applied when reviewing the grant or denial of a preliminary injunction:

> We review the factfindings of the district court, to the extent they are properly presented on appeal, under the clearly erroneous standard. The district court's application of the law is subject to de novo review. We review the district court's grant of injunctive relief for abuse of discretion, meaning we must affirm unless we at least determine that the district court has made a "clear error of judgment," or has

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[2] At oral argument, the parties indicated that discovery continued in anticipation of a hearing regarding a permanent injunction.

[3] The district court also found that Appellant had abandoned any procedural due process argument for the purpose of the motion for preliminary injunction. While the district court addressed the procedural due process argument, Appellant does not raise that issue on appeal.

applied an incorrect legal standard.

SunAmerica Corp. v. Sun Life Assurance Co. of Can., 77 F.3d 1325, 1333 (11th Cir.), cert. denied, 117 S. Ct. 79 (1996) (citations omitted).

III. DISCUSSION

Appellant asserts that the County arbitrarily and capriciously denied its substantive due process right by enforcing zoning regulations against it, thereby depriving it of the legal nonconforming use of its property.[4] The arbitrary and capricious cause of action stems from the Fourteenth Amendment which commands: "No state shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to provide two distinct guarantees: substantive due process and procedural due process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Substantive due process includes both the protections of most of the Bill of Rights, as

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[4] Appellant makes three other arguments which require only minimal discussion. First, Appellant argues that its "vested property interests are protected against confiscation by DeKalb County under the Fifth Amendment." This is not a takings case, however, because Appellant never argued that it was deprived of all economic use of its property interest.

Second, Appellant argues that the County is barred from relitigating the question of whether it has the right to blast and crush under the BOA decision. Appellees correctly note that whereas the issue before the BOA was the existence of a legal nonconforming use, this case is about the scope of that use. As a result, a factual dispute remains as to the meaning of the word "quarry" as intended by the BOA. Res judicata does not apply here.

Finally, Appellant argues that the district court misconstrued the zoning ordinance with respect to provisions barring expansion of a nonconforming use. Consideration of this issue, like all state law issues raised in this case, becomes unnecessary in light of our holding that Appellant has presented no federal cause of action.

incorporated through the Fourteenth Amendment, and also the more general protection against "certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)) (internal quotation marks omitted); *see also Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

In analyzing Appellant's claim that the County's arbitrary and capricious actions are barred by substantive due process, we begin by considering the nature of the right of which Appellant has allegedly been deprived.[5] Appellant states that it has been deprived of the right to use its land as a nonconforming use under existing zoning laws. It is well established that land use rights, as property rights generally, are state-created rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989). The district court properly held that any property rignt possessed by Appellant was a state-created land use right.[6]

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[5] As the district court noted, the exact nature of Appellant's claimed property interest is not clear. For purposes of this appeal, we assume without deciding that Appellant possessed some type of protected property interest. As a result, we do not reach Appellant's vested rights argument, or any other argument regarding the existence of a property right.

[6] Appellant also argues that "the right to freely use one's property is fundamental and implicit in the concept of ordered liberty." It is true that property rights have been important common law rights throughout history and that they are protected in many situations by procedural due process. Nevertheless, common law rights are not equivalent to fundamental rights, which are created only by the Constitution itself. *See, e.g., Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 898 (1995). Any right in the nonconforming use is a state-created right. As a result, Appellant's

Also fundamental to an understanding of this issue is the fact that enforcement of existing zoning regulations is an executive, not legislative, act. We have previously held that a "legislative act involves policy-making rather than mere administrative application of existing policies. Acts of zoning enforcement rather than rulemaking are not legislative." *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir.1991) (citations omitted).

The question therefore becomes whether a substantive due process cause of action exists where an executive actor deprived Appellant of a state-created property right. Appellant cites no authority to support the existence of such a claim, and we find considerable authority to the contrary. This Court held en banc that a plaintiff did not present a substantive due process claim when he alleged an executive deprivation of a state-created right. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 898 (1995). In *McKinney*, an employee alleged that the county arbitrarily and capriciously deprived him of his substantive due process right to employment when it fired him. *Id.* at 1554-55. McKinney admitted that he was provided a procedurally adequate pre-termination hearing, but charged that the hearing was fundamentally biased because of conflicts with other city officials. *Id.* at 1555. In analyzing McKinney's claim, the Court first noted that any property interest in employment was a state-created right. *Id.* at 1556. The Court held that rights created by state law (e.g., tort and employment law) are protected by procedural, not substantive, due process because substantive due process protects only rights created by the Constitution. *Id.* Consequently, McKinney presented no substantive due process claim. *See also Collins*, 503 U.S. at

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fundamental rights argument fails.

128; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976).

We recently reiterated this logic in the context of state education rights. *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383 (11th Cir. 1996). In accordance with school board policy and procedures, several students were suspended after telephone conferences with parents. *Id.* at 385-87. The Court held that because the decision to suspend a student is an executive act, any deprivation of the state-created right to attend school is protected only by the guarantee of procedural due process. *Id.*

Moreover, we have briefly addressed the unavailability of this cause of action in the context of state-created property rights. Where a property owner alleged that town executives arbitrarily and capriciously refused to issue a certificate of occupancy — another variety of state-created land use right — we held that no substantive due process claim had been stated. *Boatman v. Town of Oakland*, 76 F.3d 341, 346 (11th Cir. 1996); *see also Kauth v. Hartford Ins. Co. of Ill.*, 852 F.2d 951, 956-58 (7th Cir.1988). As in *McKinney*, *Breeding*, and *Boatman*, Appellant has alleged an executive violation of a state-created property right, not a deprivation of any constitutional right.

IV. CONCLUSION

Federal courts must not usurp the roles of agencies, review boards, and state courts in reviewing the wisdom of executive actions. We conclude that the district court did not abuse its discretion in denying the preliminary injunction and discern no legal or factual error. Precedent and logic demonstrate that the cause of action pled by Appellant does not exist; therefore, Appellant cannot show a substantial likelihood of success on

the merits. The district court properly denied the motion for preliminary injunction.

AFFIRMED.

APPENDIX B

FILED IN CLERK'S OFFICE:
U.S.D.C. - Atlanta
NOV 21, 1995
LUTHER D.THOMAS, Clerk
By: /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DEKALB STONE, INC., doing business as Housworth Rock Quarry, Plaintiff,	: CIVIL ACTION NO.
v.	: 1:95-cv-2077-FMH
DEKALB COUNTY, GEORGIA; LIANE LEVETAN; ELAINE BOYER; GALE WALLDORFF; JACKQUELINE B. SCOTT; KEN DAVIS; WILLIAM C. BROWN; JUDY YATES; PORTER SANFORD, III; DOUGLAS BONDS; THOMAS O. BLACK; JACK L. SMITH, Defendants.	:

ORDER

This action is before the Court on Plaintiff's Motion for

Preliminary Injunction [9-1]. At issue is the permissible use for a stone quarry located at 7242 South Goddard Road, Lithonia, DeKalb County, Georgia (the "Housworth Quarry"). Plaintiff leases the quarry from its owner, Alton Housworth, Jr. Defendants have limited, inter alia, Plaintiff's ability to blast, crush, and remove rock from the Housworth Quarry. Plaintiff contends that Defendants' prohibition violates the substantive prong of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I. FACTS

A. THE HOUSWORTH QUARRY IS ZONED FOR SINGLE FAMILY RESIDENTIAL

In 1956, DeKalb County zoned the tract of land encompassing the Housworth Quarry. In 1963, DeKalb County re-zoned that land from residential-agricultural ("RA-150") to single family residential ("R-100/R-85"). Since 1963, the quarry land has been zoned R-100/R-85: single family residential.

B. THE HOUSWORTH QUARRY IS APPROVED AS A NON-CONFORMING USE

DeKalb County's Zoning Ordinance (the "Zoning Ordinance") describes the permissible uses for land zoned as single family residential. Since 1963, the Zoning Ordinance prohibits the removal or extraction of rock, regardless of the method employed. Despite that prohibition, uses that do not conform to the Zoning Ordinance may continue as before, provided that these uses were ongoing prior to the adoption of the 1963 Zoning Ordinance, the so-called "nonconforming use." The pertinent portions of the Zoning Ordinance read as follows:

> **Sec. 27-46 Continuation.**
>
> A nonconforming use may be continued, but no nonconforming use which has been discontinued for a continuous period of six (6) months shall be reestablished.
>
> **Sec. 27-47 Extension of use or building.**
>
> No nonconforming building or use shall be extended, nor shall its value be enhanced, unless the extensions or alterations conform with the use and development provisions of the district in which it is

> located. However, a nonconforming use may be extended throughout those interior parts of a building which were designed for this use prior to the advent of the nonconforming use status, even though this extension may enhance its value.

(Zoning Ordinance §§ 27-46, 27-47). To qualify as a "nonconforming use," a use must be in existence prior to the effective date of the zoning prohibition and cannot have stopped for six months or more. Plaintiff contends that the Housworth Quarry constitutes a nonconforming use and is not subject to the strictures of the Zoning Ordinance. According to Plaintiff, the Housworth Quarry has been operational since the early days of this century and quarrying has not stopped for six months or more.

For many years after the adoption of the 1963 Zoning Ordinance, nothing of any relevance to this action occurred. In 1989, however, Alton Housworth, Jr. filed an initial application for a business license to operate a rock quarry on

the land.[1] On September 18, 1989, the Development Director of DeKalb County denied the request, fining that there was insufficient evidence to treat the land as a "legal non-conforming rock quarry use." (Plaintiff's exhibit B). Housworth appealed the Development Director's decision that the Housworth Quarry did not qualify as a nonconforming use to the DeKalb County Board of Zoning Appeals (the "BOA").

In appealing the Development Director's denial of the business license on the ground that the Housworth Quarry did not qualify as a nonconforming use as defined in the Zoning Ordinance, Housworth sought to establish that the Housworth Quarry qualified as a nonconforming use as defined in the Zoning Ordinance, namely that the Housworth Quarry existed prior to the passing of the zoning restrictions and that operations had not ceased for more than six months. In its minutes pertaining to Housworth's appeal, the BOA articulated

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[1] The record suggests that Housworth first sought a business license because of state law requirements.

both of these issues for consideration. First, was Housworth's property used as a quarry prior to the enactment of the Zoning Ordinance? And second, had the quarry use been continuous since that time?

No opposition to Housworth's appeal was presented when the BOA met, but the DeKalb County Development Department previously had recommended that Housworth's appeal be denied. By a six-to-one vote, however, the BOA approved Housworth's appeal and found the Housworth Quarry to be a legal nonconforming use under the terms of the Zoning Ordinance. The BOA's decision is one sentence and reads in its entirety as follows:

> This is to advise that the Board of Appeals, at its meeting of 11/08/89, reached the following decision on the above application: Approved appeal; overturned administrative decision that quarry operated at 7262 South Goddard Road is not a legal nonconforming use (183 acre quarry approved as a legal nonconforming use.)

(Notice of Decision by DeKalb County Board of Appeals, Complaint [1-1], exhibit D). DeKalb County did not appeal

the BOA's decision to the DeKalb County Board of Commissioners, the final level of appeal provided for in the Zoning Ordinance. (Zoning Ordinance, § 27-32).

Plaintiff contends the BOA decision allows Plaintiff to operate a quarry without any limitations. Defendant DeKalb County counters that, from the early 1900s until the BOA decision in 1989, the Housworth Quarry produced only decorative stone and rubble by hand processes, and this use of the Housworth Quarry was thus necessarily the only nonconforming use approved in the BOA's decision.

C. COMPLAINTS OF BLASTING AT THE HOUSWORTH QUARRY

A few months later in March of 1990, DeKalb County received complaints of blasting at the Housworth Quarry. On March 6, 1990, the County issued a warning demanding that all blasting stop and informed Housworth that any development of the Housworth Quarry required a development permit. Subsequent to its March 6, 1990 warning, the County informed

Housworth any blasting or rock crushing was not permitted under the BOA's above decision. According to the County, the BOA's decision permitted Housworth "to quarry rock [only] by a hand process to produce rubble and decorative stone . . . ." (March 12, 1990 from County to Housworth, Defendants' exhibit 3G).

Housworth responded in a March 22, 1990 letter, stating that any operations related to quarrying were permitted because of the BOA's decision that the Housworth Quarry was a nonconforming use. (Letter from Carl Westmoreland to County, Plaintiff's exhibit J). In an April 10, 1990 response, the County stated that there was no evidence that blasting occurred at the Housworth Quarry prior to the BOA's decision and, absent any evidence of blasting prior to November 8, 1989, any blasting violated the Zoning Ordinance. (Letter from County to Carl Westmoreland, Plaintiff's exhibit I). According to DeKalb County, the only non-conforming use the BOA decision approved was the prior continuous use of

quarrying rock by hand processes to produce rubble and decorative stone. Subsequent to the exchange of letters between the County and Housworth or his representatives, Plaintiff spent approximately $4 million in prepare to blast, crush, and remove rock from the Housworth Quarry.

D. THE STOP WORK ORDER AND CITATIONS

Over four years later and in response to more complaints of blasting, the County reasserted its position that absent evidence of blasting prior to the BOA's decision, any blasting was not an approved nonconforming use, and any blasting violated the single family residential and other zoning restrictions applicable to the Housworth Quarry. In that December 9, 1994 letter, the County ordered Housworth to stop any blasting not related to the construction of an artificial lake, which Housworth had obtained permission to build.

At 11 a.m. on December 27, 1994, the County issued Housworth a citation for operating a rock quarry in violation of the BOA's November 8, 1989 decision and Section 27-7 of

the DeKalb County Zoning Ordinance. (Plaintiff's exhibit M). Five minutes later on the same day, the County issued Housworth a citation for "OPERATING A NON-PERMITTED ROCK QUARRY FAILURE TO CEASE OPERATION AND REMOVE NON PERMITTED EQUIPT." (Plaintiff's exhibit M). On January 11, 1995, the County issued Housworth a third citation, this time for expanding a nonconforming use as well as blasting and rock crushing activities not permitted on the site. (Plaintiff's exhibit O). The next day, on January 12, 1995, the County issued a stop order and, again, ordered the cessation of all operations at the Housworth Quarry. (Plaintiff's exhibit P).

On February 6, 1995, after Housworth appeared to answer the three citations, the DeKalb County Recorders Court issued its order finding Housworth guilty of one of the three charges. (February 6, 1995 Recorders Court Order, Defendants' exhibit 3N). In its order, the Recorders Court addressed each citation in turn. The Recorders Court dismissed the first December 27,

1994 citation, issued for operating a rock quarry in violation of the BOA decision, at the prosecutor's request. Id. The Recorders Court then addressed the second December 27, 1994 citation, which was issued for "operating a non-permitted rock quarry and failure to cease operation and remove non-permitted equipment." Id.

Analyzing the second citation, the Recorder Court found that Housworth "was legally authorized to operate a rock quarry pursuant to a decision by the DeKalb County Board of Zoning Appeals dated November 8, 1989." Id. However, the Recorders Court also found that Housworth "was not legally authorized to locate and operate heavy equipment at the quarry site and their failure to remove the same" violated the Zoning Ordinance. Id. Notwithstanding its findings, the Recorders Court declared Housworth not guilty because "the summons as written is couched in conjunctive . . . ." Id. As to the final citation, the Recorders Court found Housworth guilty because the quarry property was expanded beyond its original 183

acres, and this expansion violated the Zoning Ordinance as an expansion of Housworth's legal nonconforming use. Id.

E. PLAINTIFF DENIED THE DEVELOPMENT PERMIT

Prior to the Recorders Court's decision, Plaintiff sought the County's permission to operate a quarrying operation at the Housworth Quarry, while maintaining its position that additional authorization was not required. First, on December 28, 1994, Plaintiff applied for a development permit to conduct blasting and rock crushing operations pursuant to the BOA's decision. Plaintiff also acquired an additional seventy acres adjacent to the Housworth Quarry's original 183 acres to serve as a buffer to the quarrying operations at the Housworth Quarry.[2] On January 19, 1995, Plaintiff applied for a building permit for the quarrying equipment at the Housworth Quarry,

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[2] The additional acreage was the subject of the January 11, 1995 citation for expanding the legal nonconforming use. Housworth was found guilty on that charge. At the October 17, 1995 hearing, Plaintiff stated that it never intended to quarry or otherwise use the seventy acres. The seventy acres were acquired solely to assuage DeKalb County's concern about the noise and pollution of quarrying.

but reserved its belief that such a permit was unnecessary. Following the Recorders Court decision, the County denied Plaintiff's application for a development permit on February 10, 1995. In denying Plaintiff's development permit, the County warned Plaintiff that all machinery and equipment for the removal and extraction and crushing of rock must be removed by February 24, 1995. After receiving the February 10, 1995 denial letter, Plaintiff stopped all operations at the Housworth Quarry.

Plaintiff did not appeal the County's denial of its development permit to the BOA. Regarding the single criminal citation for which Housworth was found guilty, on March 9, 1995, Housworth filed an application for a writ of certiorari from the DeKalb County Recorders Court to the DeKalb County Superior Court. That writ was sanctioned. On August 15, 1995, however, Housworth voluntarily dismissed the writ of certiorari. Two days later, Plaintiff filed this action in federal court.

F. FEDERAL COURT

On September 19, 1995, Plaintiff filed its Motion for a Preliminary Injunction. After Defendants responded, this Court held a hearing on the motion for preliminary injunction on October 17, 1995. Both parties have filed post-hearing briefs, and the Court now turns to the Plaintiff's Motion for Preliminary Injunction.

II. PRELIMINARY INJUNCTION STANDARD

Before granting Plaintiff's Motion for Preliminary Injunction, the Court must find that Plaintiff has established these four factors:

> (1) a substantial likelihood of success on the merits;
> (2) a substantial threat of irreparable injury if the injunction were not granted;
> (3) that the threatened injury to the plaintiffs outweighs the harm an injunction may cause the defendant; and
> (4) that granting the injunction would not disserve the public interest.

Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994). "Because the preliminary injunction is an extraordinary

and drastic remedy, it is not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites." Id. (internal citations omitted). Here, the Court finds that Plaintiff fails to demonstrate a substantial likelihood of success of the merits and, thus, does not reach the remaining three factors. The Court explains below Plaintiff's present inability to show a substantial likelihood of success on the merits, at least on the record currently before the Court.

III. PLAINTIFF'S CLAIMS

Plaintiff challenges the constitutionality of Defendant DeKalb County's restriction of blasting and rock-crushing activities at the Housworth Quarry. At the October 17, 1995 hearing, Plaintiff orally confirmed that its sole federal constitutional claim is an alleged violation of substantive due process. (October 17, 1995 hearing transcript, at p. 74). Subsequent to the October 17th hearing, however, Plaintiff filed

a brief, arguing, as an alternative ground, violations of Plaintiff's procedural due process rights. Defendants object to Plaintiff's attempt to add other federal constitutional claims and request that Plaintiff not be allowed to amend its Complaint through post-hearing briefs.

After reviewing Plaintiff's Complaint, the Court finds that Plaintiff alleged violations of the Due Process Clause of the Fourteenth Amendment and did not distinguish between the procedural and substantive prongs of the Due Process Clause. Nonetheless, as part of its argument during the October 17, 1995 hearing, Plaintiff expressly disavowed pursuing any procedural due process violation in it Motion for Preliminary Injunction; instead, Plaintiff pursued solely a violation of substantive due process. Id. For purposes of deciding the pending motion for preliminary injunction, the Court initially considers whether Plaintiff has met the criteria for a preliminary injunction on its substantive due process claim.

IV. PLAINTIFF'S SUBSTANTIVE DUE PROCESS

CLAIM

Plaintiff alleges that Defendants' decision to prohibit blasting and rock-crushing at the Housworth Quarry in the face of the BOA's 1989 decision violates Plaintiff's rights under the substantive prong of the Due Process Clause of the Fourteenth Amendment. As this action involves a challenge to zoning decisions, the Court first reviews the constitutional claims available to those unhappy with local zoning decisions.

Generally, "the Constitution does not prevent a local government from restricting, controlling, or limiting the development of land to promote what it perceives to be the general welfare interests of the community as a whole," provided the ordinances do not run afoul of the following four constitutional safeguards:

> 1. the Fifth Amendment right not to have land taken without just compensation (a "just compensation claim);
> 2. the Due Process Clause right not to have the use and value of land infringed upon to such an extent that it is tantamount to having been taken by eminent domain (a "due process takings" claim);

> 3. the Due Process Clause right not to have the use of the land restricted arbitrarily and capriciously, which is a right not to have his use of his land restricted for reasons having no substantial relation to the public health, safety, morals, or general welfare (a "substantive due process" or "arbitrary and capricious due process" claim);
> 4. the Equal Protection Clause right not to be treated in a way that violates that clause (an "equal protection" claim).

Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1374 (11th Cir. 1993) (citing Eide v. Sarasota County, 908 F.2d 716, 720-23 (11th Cir. 1990)). Because Plaintiff alleges that Defendants' restriction on the Housworth Quarry violates substantive due process, the Court focuses on the third of the four claims listed above.

A substantive due process claim may be either a facial or an as applied challenge. Eide v. Sarasota County, 908 F.2d 716, 721-22 (11th Cir. 1990). As Plaintiff challenges Defendants' treatment of Plaintiff's particular parcel of property, Plaintiff appears to proceed under an as applied substantive due process theory. In plainer terms, Plaintiff

contends that Defendants' prohibition of blasting and rock-crushing at the Housworth Quarry deprives Plaintiff of its nonconforming use approved by the BOA decision. Plaintiff attacks Defendant's actions as arbitrary and capricious in violation of Plaintiff's substantive due process rights.

A. DEFENDANTS ACTIONS REGARDING THE BOA DECISION

In framing its argument, Plaintiff focuses primarily on the 1989 BOA decision. Specifically, Plaintiff argues that the 1989 BOA decision granted Plaintiff the unlimited right to quarry rock from the Housworth Quarry regardless of the method used for quarrying. According to Plaintiff, once the BOA approved the Housworth Quarry as a legal nonconforming use, any form of quarrying at the Housworth Quarry is a permissible nonconforming use. It remains unclear whether Plaintiff alleges (1) that its constitutionally protectable interest lies in the BOA decision or (2) that its protectable interest lies in the Housworth Quarry itself. The Court will

consider both theories in this order.

Under either of Plaintiff's theories, Defendants respond that only uses in existence prior to the BOA decision qualify and were approved as legal nonconforming uses by the BOA, and any use not in existence prior to November, 1989 must meet the single family zoning requirements for the area surrounding the Housworth Quarry. According to Defendants, the only use in existence at the Housworth Quarry prior to November, 1989 BOA decision was the quarrying of dimension stone, allegedly different from Plaintiff's current desire to conduct a large scale commercial gravel and rock-crushing operation at the Housworth Quarry. In addressing Plaintiff's Motion for Preliminary Injunction and the claims in Plaintiffs' Complaint, Defendants raise three main arguments: (1) Plaintiff's claim is not ripe, (2) Plaintiff fails to state a claim, and (3) Defendants' application of the zoning law is not arbitrary and capricious. The Court first addresses whether Plaintiff's substantive due process claim is ripe.

B. RIPENESS

Whether a claim is ripe goes to this Court's jurisdiction. Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1212 (11th Cir. 1995). "The purpose of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Id. (internal citations omitted). Here, Plaintiff alleges an as applied substantive due process claim. "An as applied substantive due process challenge focuses on whether the actual decision to apply the zoning to the property was 'arbitrary and capricious.' Thus, such a claim presents a sufficiently concrete question for review when the zoning decision has been finally made and applied to the property." Id. The Court considers the ripeness of Plaintiff's claim regarding the application of the zoning laws to the Housworth property. Here, the zoning requirement relied upon by Defendants were passed in 1963. The BOA decision was rendered in 1989. Additionally, Defendants have evidenced the application of the 1963 zoning restrictions to the

Housworth Quarry and Defendants' interpretation of the 1989 BOA decision as approving only limited methods of quarrying by sending multiple letters and by issuing a stop work order and three citations. Also Plaintiff's application for a development permit to allow the blasting and rock quarrying at the Housworth Quarry was denied because of Defendants' interpretation of the Housworth Quarry's zoning status. Based upon the above facts and mindful that a substantive due process claim becomes ripe when a final decision to apply the zoning requirements to Plaintiff's property occurs, the Court finds that Plaintiff's substantive due process claim is ripe for adjudication. See, e.g. Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1212 (11th Cir. 1995); Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1547 (11th Cir. 1994).

C. PLAINTIFF'S FAILURE TO A STATE SUBSTANTIVE DUE PROCESS CLAIM

1. McKinney v. Pate

Defendants also contend that Plaintiff fails to state a claim

under the substantive prong of the due process clause. Specifically, Defendants contend that Defendants' prohibition on Plaintiff's blasting and rock-crushing operations at the Housworth Quarry is a non-legislative act and, as such, is subject to the Eleventh Circuit's reasoning in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), which prohibits substantive due process claims for injuries caused by non-legislative acts.

In McKinney, the Eleventh Circuit sitting en banc addressed the viability of a substantive due process claim by a government employee based upon his allegedly wrongful termination. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). In finding that the plaintiff could not pursue a substantive due process claim, the Eleventh Circuit explained that substantive due process claims differ from their procedural counterparts in three important ways.

First, "[t]he substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is,

rights that are 'implicit in the concept of ordered liberty.'" Id. at 1556 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). "[A]reas in which substantive rights are created only by a state law . . . are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.'" Id. (quoting Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring)).

Second, substantive and procedural due process claims differ in "the manner in which a violation of the right occurs." Id. A substantive due process violation "is complete when it occurs," while a violation of procedural due process "is not complete unless and until the State fails to provide due process." Id. at 1557 (internal quotations omitted). Here, the Eleventh Circuit made an important distinction between violations caused by legislative acts and violations caused by non-legislative or executive acts.

In reaching its decision regarding the termination of a

state employee, the Eleventh Circuit cautioned that "[t]he analysis, and the substantive/procedural distinction . . . that is appropriate for executive acts is inappropriate for legislative acts." Id. at 1557 n.9. "Executive acts characteristically apply to a limited number of persons (and often to only one person); executive acts typically arise from the ministerial or administrative activities of members of the executive branch." Id. "Legislative acts, on the other hand, generally apply to a larger segment of — if not all of — society; laws and broad-ranging executive regulations are the most common examples." Id. "[O]nly when addressing legislative acts has the Supreme Court mandated that states must demonstrate that they are violating private interests only as necessary to promote state interests." Id. at 1557 n.9. Thus, the applicability of McKinney's discussion of substantive due process claims based on state created property interests appears to turn on whether the injury was caused by a legislative act or a non-legislative/executive act.

Third, the Eleventh Circuit distinguished procedural and substantive due process based upon the typical remedy awarded. For substantive due process violations, "the claimant seeks compensatory damages for the value of the deprived right." Id. "In procedural due process cases, however, although the claimant may seek compensatory damages, the primary relief sought is equitable . . . ." Id. "These process-based remedies are unique to procedural due process rights, and because of the definition of a substantive due process rights as one which may not be violated regardless of the process, may not be awarded to one claiming a substantive due process violation." Id.

Having identified the above three distinctions, the Eleventh Circuit found that the plaintiff in McKinney possessed only a state-created property interest, and because that right was not a fundamental right and had been harmed only by an executive act, the plaintiff could state only a procedural due process claim. Id. at 1560-61.

2. McKinney v. Pate Applies to Zoning Challenges

Defendants urge this Court to extend McKinney to zoning challenges such as the one brought by Plaintiff. At least one district court in this circuit has applied McKinney to a zoning challenge. Sullivan Properties, Inc. v. City of Winter Springs, No. 95-492-civ-ORL-18, 1995 WL 568506, slip op. at *1 (M.D. Fla. Sept. 25, 1995); see also Villas of Lake Jackson v. Leon County, 884 F. Supp. 1544, 1574-75 (N.D. Fla. 1995) (considering the impact of McKinney before deciding the issue on other grounds).

In Sullivan Properties, the plaintiff challenged the defendant's decision to deny the plaintiff a "permit to dig a 'borrow pit.'" Sullivan Properties, Inc. v. City of Winter Springs, No. 95-492-civ-ORL-18, 1995 WL 568506, slip op. at *1 (M.D. Fla. Sept 25, 1995). After considering McKinney, the court in Sullivan Properties first found that any property interest in the building permit was created by state law. Id. at *5-6. The court then decided that the denial of the building

permit was a non-legislative act and, as such, the plaintiff could bring only a procedural due process claim and not a substantive due process claim. Id. at 7-9. Thus, whether Plaintiff's injury stems from a legislative or non-legislative act becomes crucial to determining whether Plaintiff states a viable substantive due process claim. Drawing from the reasoning in McKinney and Sullivan, where a plaintiff's property is affected adversely by a non-legislative act, only a procedural due process claim can be alleged; however, where the injury results from a legislative act, the substantive prong of the Due Process Clause remains available. The Court returns to the parties' characterization of Plaintiff's claim.

3. Plaintiff's Property Interest Created By the BOA Decision

In this action, neither party disputes that, if Plaintiff has a property interest, it is created by state law. Cf. Board of Regents of States Colleges v. Roth, 408 U.S. 564, 577 (1972) (property interests are not created by the Constitution, but by

state law). However, it is unclear to the Court precisely where Plaintiff claims its property interest lies.

Based upon the arguments at the October 17th hearing, Plaintiff appears to allege that its property interest lies in the actual BOA decision approving the Housworth Quarry's legal nonconforming use as a rock quarry. To the extent the Plaintiff argues that its protectable interest is derived from or created by the BOA decision, the Court finds that Plaintiff has not demonstrated a substantial likelihood of success on the merits for three reasons. First, Plaintiff has not demonstrated that state law gives Plaintiff a property interest derived from or created by the BOA decision. Second, Plaintiff's injuries stem from executive acts. Third, Plaintiff has not shown that Defendants injured any alleged property interest arbitrarily and with caprice. The Court first turns to whether Plaintiff has a property interest created by the BOA decision.

Plaintiff assumes without citation that it possesses a constitutionally protected property interest created by the BOA

decision. Defendants counter that, at most, the BOA decision represents only an administrative finding and cite two Georgia Supreme Court cases to support their proposition: See Emory University v. Levitas, 260 Ga. 894 (1991) and Dougherty County v. Webb, 256 Ga. 474 (1986). However, neither party addresses with much specificity whether, under Georgia law, the BOA decision creates a protectable property interest.

The Court finds that Plaintiff has not shown on the current record that Plaintiff has a constitutionally protectable property interest created by or derived from the BOA's 1989 decision. Even assuming Plaintiff has a protectable interest, Plaintiff has an interest in only what the BOA approved. The BOA decision did not grant Plaintiff an unlimited right to operate a rock quarry in any manner Plaintiff chooses. Instead, the BOA decision only approved the nonconforming use in existence at the time the Zoning Ordinance was enacted. The BOA decision only confirmed the Housworth Quarry's status as a legal nonconforming use as defined by the Zoning Ordinance,

as explained in greater detail infra at pages 18-20. Plaintiff's protectable interest derived from the BOA decision, if it has one at all, is no greater than what the BOA decision provided.

4. Plaintiff's Injury Was Caused by Executive Acts

Even assuming Plaintiff possesses a property interest from the BOA decision, the Court finds that the harm suffered by Plaintiff was incurred by non-legislative or executive acts. Specifically, DeKalb County's Department of Public Works has restricted the uses at the Housworth Quarry, issuing stop work orders and citations to enforce its position. Plaintiff can point to no legislative act that has harmed any interest held by Plaintiff in the BOA decision. The Court concludes that Plaintiff complains only of harm caused by non-legislative or executive acts and, thus, cannot state a claim under the substantive prong of the due process clause. See McKinney, 20 F.3d at 1557, n.9; Sullivan Properties, at *6-9.

Nonetheless, without ignoring its above findings, the Court finds that the impact of the BOA decision and Defendants'

subsequent interpretation of that decision provide the clearest grounds for this Court's ruling. Therefore, solely for purposes of deciding Plaintiff's Motion for Preliminary Injunction, the Court assumes away the hurdles discussed above and examines whether Defendants' actions violate substantive due process.

D. DEFENDANTS' ACTIONS WERE NOT ARBITRARY AND CAPRICIOUS

In this circuit, a substantive due process claim occurs where (1) the plaintiff is deprived of a federal constitutionally protected interest and (2) the deprivation is a result of an abuse of governmental power sufficient to raise an ordinary tort to the statute of a constitutional violation. Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1374 (11th Cir. 1993). Here, Plaintiff fails to demonstrate a likelihood of success on the second prong of its substantive due process claim, and the Court assumes without deciding that Plaintiff possesses a property interest protected by substantive due process. Corn, 997 F.2d at 1374 (test for substantive due process is

conjunctive and court need only find either of the two components missing to find no violation).

A prerequisite to the second prong is a showing that Defendants acted arbitrarily and capriciously. Id. An act is arbitrary and capricious where it "does not bear a substantial relation to the public health, safety, morals, or general welfare." Id. (internal quotations omitted). The Court explains why Plaintiff fails to show a substantial likelihood that Defendants acted arbitrarily and with caprice.

Plaintiff contends that the 1989 decision by the BOA recognized the Housworth Quarry's existence as a quarry and that a quarry may be quarried by whatever means and for whatever purpose desired, provided that the use is defined as quarrying. Plaintiff's belief, however, is contradicted by an examination of the 1989 decision. In the notice of decision received by Plaintiff, the BOA states "overturned administrative decision that quarry operated at 7262 South Goddard Road is not a legal non-conforming use (183 acre

quarry approved as a legal non-conforming use)." (Notice of Decision by DeKalb County Board of Appeals, Complaint [1-1], exhibit D). By its very words, the BOA approved the Housworth Quarry as a legal nonconforming use. According to Plaintiff that ends the inquiry and any restriction on quarrying at the Housworth Quarry is unconstitutional. The Court does not agree.

First, the context surrounding the BOA decision must be considered. The BOA decision was rendered in response to Housworth's appeal. Housworth initially sought a business license to operate a rock quarry at the Housworth Quarry. That permit was denied because the Development Director determined that a rock quarry was not a permitted use for single family residential zoning, and the Housworth Quarry did not qualify as a legal nonconforming use. Housworth appealed the Development Director's findings, and the BOA decided, based upon the evidence presented by Housworth, that the Housworth Quarry was a legal nonconforming use under the

Zoning Ordinance.

To qualify as a legal nonconforming use under the Zoning Ordinance, a use must exist at the time the Zoning Ordinance was enacted and cannot have been stopped for six continuous months or more. (See Zoning Ordinance § 27-46). Therefore, the BOA was presented solely with the question of whether the Housworth Quarry was a use in existence at the time of the zoning restriction, and whether its use had stopped for six months. The minutes of the BOA's hearing on Housworth's appeal confirm that the BOA considered these two questions.

Deciding that the BOA confirmed the Housworth Quarry's status as a legal nonconforming use does not end the inquiry because the BOA only confirmed the use in existence at the time of the Zoning Ordinance's enactment. Under the terms of the Zoning Ordinance, a nonconforming use may be continued, but any extension or enhancement of value of the nonconforming use is prohibited unless it complies with the zoning requirements applicable to the area where the legal

nonconforming use sits, as follows:

> No nonconforming building or use shall be extended, nor shall its valued be enhanced, unless the extensions or alterations conform with the use and development provisions of the district in which it is located. However, a nonconforming use may be extended throughout those interior parts of a building which were designed for this use prior to the advent of the nonconforming use status, even though this extension may enhance its value.

(Zoning Ordinance, § 27-47). In other words, a legal nonconforming use is exempt from the Zoning Ordinance until it is extended or its value enhanced. When a legal nonconforming use is extended or its value enhanced, the extensions or enhancements must comply with the present Zoning Ordinance regardless of the exempt status of the original nonconforming use.

By its very terms, the Zoning Ordinance contemplates that an otherwise legal nonconforming use may be changed, and those changes do not enjoy the exempt status afforded the original nonconforming use and must comply with the current zoning requirements. Apparently in recognition of the above

requirements, Plaintiff argues that the nonconforming use approved by the BOA is that of a quarry and, thus, any quarrying at the Housworth Quarry is exempt from the Zoning ordinance. Plaintiff's position that all quarries are alike is not supported by the record.

As evidenced in the current record, there are different types of quarries and quarrying may take many different forms. Thus, Plaintiff fails to demonstrate a substantial likelihood of success that all quarries are alike. Indeed, the record suggests just the opposite: that there are, and have been, different types of quarries and quarrying operations in DeKalb County, Georgia.

Plaintiff also fails to demonstrate a substantial likelihood of success in showing that the Housworth Quarry was used to blast and crush rock prior to 1989. While the record reveals that some limited and sporadic blasting occurred prior to the Zoning Ordinance, Defendants' position, as the Court understands it, is that Plaintiff is attempting to turn the

Housworth Quarry into a rock crushing and mining operation, a use where blasting and rock crushing are more prevalent than the use Defendants contend was approved by the Zoning Board: the quarrying of dimension stone. In any event, the burden rests with Plaintiff to show a substantial likelihood of success, and the Court finds that Plaintiff has not carried its burden on the record as presented.

In sum, Plaintiff has not shown that any actions of Defendants, including Defendants' reading of the effect of the BOA decision, are arbitrary and capricious. Plaintiff fails to demonstrate a substantial likelihood of success on the merits of its substantive due process claim predicated upon a property interest derived from the BOA decision. The Court now considers two alternative readings of Plaintiff's claim as pleaded.

D. THE HOUSWORTH QUARRY AS THE PROPERTY INTEREST

Despite Plaintiff's focus upon the BOA decision during

the October 17th hearing, portions of Plaintiff's Complaint and post-hearing briefs could be read to allege that Plaintiff has a property interest in the Housworth Quarry, and, thus, its use as a rock quarry, and that Defendants' actions deprive Plaintiff of that property interest. Even considering Plaintiff's claim in this fashion, the law and analysis above applies with equal force to Plaintiff's claims.

First, Plaintiff still alleges harm from Defendants' limitations on the quarrying at the Housworth Quarry based on the stop work order and citations. These are executive enforcement actions and arguably barred by the Eleventh Circuit's reasoning in McKinney. See McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

Second, Defendants' interpretation of the BOA decision and Defendants' actions based upon that interpretation are not arbitrary and capricious. As described in part IV.D. of this order, the BOA decision confirmed the Housworth Quarry as an existing legal nonconforming use under the Zoning

Ordinance, and the record before the Court demonstrates (1) that there are different varieties of quarries, and (2) that the Housworth Quarry's use as a quarry was limited to certain quarrying uses. Plaintiff has not demonstrated a substantial likelihood of success on the merits of a substantive due process claim, even if cast in the manner described above.

Finally, Plaintiff's Complaint, despite its focus on the BOA decision, could be read to challenge the zoning of the Housworth Quarry in general. If that is Plaintiff's claim, then Plaintiff appears to avoid the hurdles arguably posed by McKinney, but still fails to demonstrate a substantial likelihood of success on the merits of a claim that Defendants' interpretation of the BOA decision and application of the Zoning Ordinance to the Housworth Quarry actions are arbitrary and capricious. See supra part IV.C.3. of this order. Plaintiff has not developed the record to demonstrate that the BOA decision allows anything more than the nonconforming use in existence prior to the BOA decision. Additionally,

Plaintiff fails to demonstrate that Defendants' interpretation of the BOA decision is arbitrary and capricious or that Defendants' application of the Zoning Ordinance to the Housworth Quarry is arbitrary and capricious in light of the BOA decision. Put simply, Plaintiff focuses upon only two words, "rock quarry," in the BOA decision, but Plaintiff's view ignores the context of how the BOA decision was rendered and what the BOA decided. As the record stands, Plaintiff fails to demonstrate a substantial likelihood of success on the merits of it substantive due process claim as pleaded.

V. PROCEDURAL DUE PROCESS

Although Plaintiff stated at the hearing that it moved for preliminary injunctive relief only on a substantive due process theory, the Court's review of Plaintiff's Complaint and Plaintiff's post-hearing briefs suggest that Plaintiff's may be claiming a violation of procedural due process. Therefore, the Court briefly examines whether Plaintiff has demonstrated a substantial likelihood of success on the merits of a procedural

due process claim.

Under Supreme Court precedent, procedural due process is not violated unless there is a lack of process in depriving an individual of property, as follows:

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. The constitutional violation actionable under § 1983 [or Bivens] is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). On the record presented, there is a substantial question about whether Plaintiff has been denied due process because state procedures remain for Plaintiff to contest any deprivation and whether Plaintiff voluntarily abandoned the available state process. After consideration of the current record, the Court finds that Plaintiff has not demonstrated a substantial likelihood of

success on the merits of any procedural due process claim it has pleaded.

VI. CONCLUSION

The Court finds that, on the record presented, Plaintiff has not shown that it has a substantial likelihood of success on the merits of its substantive due process claim as currently pleaded or on a procedural due process claim. Plaintiff's Motion for Preliminary Injunction [9-1] is **DENIED**.

SO ORDERED this 21st day of November, 1995.

/s/
FRANK M. HULL
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 7
CLERK

No. 97-71

In The

Supreme Court of the United States

October Term, 1996

DEKALB STONE, INC.,

Petitioner,

v.

DEKALB COUNTY, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

Whether the Supreme Court should issue a writ of certiorari when petitioner is appealing the denial of its motion for preliminary injunction without showing abuse of discretion by the trial court and when the evidence presented to the trial judge on the motion did not show a substantial likelihood that petitioner would succeed on the merits of its claim that the property was previously mined as a rock crushing quarry.

Whether certiorari should be granted when the Eleventh Circuit's decision was consistent with existing precedent of this Court and when petitioner's asserted state law property interest has not been recognized by this Court as a "fundamental" right or liberty protectible under the substantive due process clause.

LIST OF PARTIES

The list of parties provided by petitioner appears to be complete.

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OPINIONS BELOW

The reported opinion of the United States Court of Appeals for the Eleventh Circuit is located at 106 F.3d 956 (11th Cir. 1997) and is accurately set forth as Appendix A, beginning on page 1a of DeKalb Stone's petition for certiorari. The decision and order of the United States District Court for the Northern District of Georgia, Atlanta Division, has not been reported, and is accurately reprinted and attached as Appendix B, beginning at page 10a of DeKalb Stone's petition for certiorari.

JURISDICTION

DeKalb Stone, Inc. has petitioned for writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves interpretation of the Fourteenth Amendment to the United States Constitution which reads in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .
>
> U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

A. Summary:

The current petition presents no compelling case for granting certiorari. It is a local land use case where Plaintiff has alleged no taking of property or deprivation of any interest protected under substantive due process. Instead, this Plaintiff disguised a takings claim as one for substantive due process because the actions complained of do not amount to a taking. Specifically, Plaintiff may use the land lawfully in a variety of manners, either in accordance with a nonconforming use granted to Plaintiff's lessor in 1989 to continue a hand picked dimension stone quarry, or it may use the land in

accordance with the uses allowed under the property's current zoning. When Plaintiff sought to expand the dimension stone quarry and turn it into a commercial gravel plant where substantial blasting and crushing would occur, the County halted this illegal expansion. Plaintiff then brought this case claiming a substantive due process violation in an effort to circumnavigate DeKalb County's ordinance which prohibits the unauthorized expansion of nonconforming uses. However, even under a substantive due process analysis, the claim fails because Plaintiff has not asserted a deprivation of a fundamental right.

Through this petition, Plaintiff seeks a further review of the denial of a motion for preliminary injunction, and granting certiorari will likely result in piecemeal litigation and further appeals. Evidence presented to the District Court on the motion for preliminary injunction indicated that the property had only been used prior to 1989 as a hand worked, dimension stone quarry, and that Plaintiff was trying to illegally expand this nonconforming use by turning it into a surface mine and commercial gravel crushing operation in violation of the County's ordinances. On the evidence presented, the District Court denied the injunction, finding Plaintiff was (1) not likely to prevail on the merits of its claim that such a commercial gravel operation previously existed on the property, and (2) not likely to prevail on a claim that the County arbitrarily or capriciously stopped this illegal expansion of the nonconforming use.

The Eleventh Circuit affirmed the denial of the preliminary injunction because there was no abuse of discretion by the trial Court. *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 960 (11th Cir. 1997). The Eleventh Circuit also opined that Plaintiff failed to state a claim for substantive due process relief because, at most, it alleged only an executive violation of a state created property right instead of alleging any deprivation of a fundamental right protected under the constitution. *Id.* at 959-960. That reasoning is consistent with

precedent of this Court and therefore presents no compelling case to accept certiorari either.

B. Statement of Facts:

Zoning Regulations Applicable To The Subject Property:

At all relevant times for this case, the real property has been owned by the Housworth family. The land itself is located in DeKalb County, a political subdivision of the State of Georgia. From 1991 to the present, DeKalb Stone, Inc. (Petitioner herein) has subleased the property from the Housworth's wholly owned corporation, Bradley Mountain, Inc.

In 1956 when DeKalb County enacted its first Zoning Ordinance, the subject property was located in an area zoned as RA-150 (Residential-Agricultural).[1] Subsequently, in 1963, the Subject Property was rezoned by the DeKalb County Board of Commissioners to R-100 and R-85 (Single Family Residential) and has been so zoned ever since.

The removal or extraction of rock or gravel by any process, including hand picking of dimension stone, is not a permitted use in the Single Family Residential zoning districts. This Zoning Ordinance and all subsequent revisions provided that nonconforming uses in existence at the time of the adoption of the Zoning Ordinance may be continued. However, a nonconforming use will be lost if discontinued for a period of six (6) straight months and it cannot be re-established at that point. The Zoning Ordinance further provided that a nonconforming use cannot be extended, nor can its value be enhanced, unless the extensions or enhancements conform with the zoning classifications for the district in

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[1] The 1956 Zoning Ordinance provided that quarrying uses could be continued in the RA-150 zoning district if a conditional use permit was obtained, and that use permits were required for any extension of quarrying operations. Yet, no application for a conditional use permit or permit to extend quarrying operations for the Subject Property was ever filed.

which it is located. Zoning Ordinance §§27-46, 27-47. In other words, a nonconforming use is exempt from the zoning ordinance until it is extended or its value enhanced, at which time it must then conform with the existing zoning for the area where the property is located.

Another option for a property owner wishing to legally expand a nonconforming use is to apply for a rezoning of the property. The DeKalb County Zoning Ordinance permits a property owner to apply to have property rezoned from one zoning district to another. Under this ordinance, only the Board of Commissioners, the legislative branch of DeKalb County government, is permitted to rezone property. However, neither Housworth nor Plaintiff DeKalb Stone have ever applied to the Board of Commissioners to rezone the property to the M-2 (Heavy Industrial) classification where blasting and crushing operations would be permitted.

Housworth's Hearing Before the Zoning Board of Appeals:

In 1989, twenty-six (26) years after the Subject Property was zoned for Single Family Residential, Alton Housworth filed his first application for a business license to operate a rock quarry on the Subject Property. On September 18, 1989, the Development Director denied the request because there was insufficient evidence to establish the *continuous* operation of a dimension stone quarry on the Subject Property. Housworth then appealed the Development Director's decision to the DeKalb County Board of Zoning Appeals. The Board of Zoning Appeals is an administrative body created by the DeKalb County Board of Commissioners through the Zoning Ordinance, with limited, defined duties. The Board of Appeals has no authority to vary the uses permitted on an appellant's property nor can it rezone the property since only the Board of Commissioners has this power. Instead, the

Board of Appeals' authority is exclusively limited to correcting errors alleged to have been made by County administrative officials while enforcing the county code. Zoning Ordinance §27-68(4).

At the Zoning Board of Appeals, Housworth sought to overturn the decision of the Development Director, i.e. that insufficient evidence had been presented to establish a *continuous* non-conforming use as a quarry. On November 8, 1989, the Board of Appeals held a hearing on Housworth's appeal. The evidence submitted by Housworth to the Board of Appeals established that the Subject Property had perhaps been continuously used as a hand picked dimension stone quarry. On that basis, the Board of Appeals overturned the administrative decision and granted Plaintiff a nonconforming use. However, there was absolutely no evidence submitted to the Board of Appeals that blasting and rock crushing operations existed on the Property in 1956 – when the first Zoning Ordinance came into effect – or at any time thereafter. Hence, the Board of Appeals could not have granted a nonconforming use for activity which had never occurred at the property.

Appellant's Attempt to Convert the Dimension Stone Quarry to a Surface Mine and Rock Crushing Quarry:

This grant of a nonconforming use was subject to the provisions of the Zoning Ordinance prohibiting the extension or enhancement of nonconforming uses. Yet, following the 1989 Board of Appeals' decision, Housworth and the Plaintiff attempted to illegally expand the grandfathered dimension stone quarry and develop it into a surface mine and rock crushing quarry.

In March of 1990, Housworth attempted to conduct blasting activity on the property without first seeking County approval for this activity. Upon receiving complaints of blasting at the property, DeKalb County promptly warned Housworth to halt the blasting. DeKalb County further informed Housworth that the Zoning Ordinance required him

to apply for a development permit prior to any further development of the subject property.

Later in March of 1990, the Development Director informed Housworth that the use of the Subject Property must be limited to those operations existing on the Subject Property at or before the grant of the nonconforming use, which was a dimension stone quarry producing rubble, granite curbing, and decorative stone. The Development Director specifically advised Housworth that the Board of Appeals' decision did not approve any blasting and rock crushing activity because no such evidence had been presented that this activity had previously been conducted on the property. The Development Director invited the Housworths to provide such proof and the matter would be reconsidered. Mr. Housworth chose not to provide the requested information, nor did he seek to appeal the Development Director's decision – to prohibit blasting and crushing – to the Board of Appeals. Likewise, Housworth did not apply to DeKalb County for a permit to develop a rock crushing quarry on the property.

Subsequently, the Housworths leased the property to DeKalb Stone. Specifically, on March 15, 1991, the Housworth family incorporated under the name of Bradley Mountain, Inc., and this entity then leased the property. Just two months later, on May 29, 1991, Bradley Mountain, Inc. subleased the property and sold the existing quarry operation to the current lessee, DeKalb Stone, Inc. To purchase the existing quarry operation, DeKalb Stone paid a total of $100.00 and this included the equipment used in the business. The equipment consisted of drills, hammers, wedges, hand tools, and an air compressor which is tyypical of a dimension stone quarry and not a rock crushing quarry.

After buying the existing dimension stone business and leasing the land, Plaintiff DeKalb Stone set about its goal of opening a rock crushing plant even though DeKalb County had previously given clear warnings that this activity was an illegal expansion of the nonconforming use. Documents submitted by DeKalb Stone in 1992 to the Georgia Department of

Natural Resources confirm Plaintiff's intent to open a full scale surface mine and rock crushing quarry where none had previously existed. DeKalb Stone's Application for a Surface Mining Permit to the Georgia Department of Natural Resources includes a projected mining plan, which in turn identifies the large scale capital equipment needed in order to build this surface mine and rock crushing quarry, such as front end loaders, bulldozers, "off road" trucks, explosives and conventional trucks.

The State of Georgia has regulated surface mining activities, including blasting and crushing of rock, since 1968.[2] Although DeKalb Stone may now contend that such activities were conducted prior to 1989, its own documentary evidence refutes this contention. Specifically, DeKalb Stone first submitted an application for a Surface Mining Permit on June 23, 1992. Prior to then, neither Plaintiff nor its predecessors had ever held a surface mining permit for this property. State law requires that an owner obtain a surface mining permit prior to commencing operations and it prescribes civil and criminal penalties for the failure to comply with the Surface Mining Act. O.C.G.A. §12-4-75; §12-4-83; and §12-4-84. However, the State of Georgia specifically exempts "dimension stone quarries" from its definition of "surface mining." O.C.G.A. §12-4-72(15). This leads to the inescapable conclusion that Plaintiff's predecessors were either running a dimension stone quarry and did not need a state surface mining permit, or, Plaintiff's predecessors were running an illegal surface mine and rock crushing quarry. In the latter event, Plaintiff has no right to continue an illegal surface mine because under the law of the State of Georgia, an illegal use of property does not vest any rights.[3]

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[2] "Surface mining" is defined as "any activity constituting all or part of a process for the removal of minerals, ores, and other solid matter for sale or processing or for consumption in the regular operation of a business." Tunnels, shafts, and dimension stone quarries shall not be considered to be surface mining." O.C.G.A. §12-4-72(15).

[3] *Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustments of City of Atlanta*, 254 Ga. 221, 327 S.E.2d 178, 183 (1985), citing *Maguire v.*

DeKalb County's Response to Renewed Blasting:

From 1990 through late 1994, there was no further illegal blasting reported to the County. During this four year span, Plaintiff went about the task of getting the necessary permits from the State of Georgia to run a surface mine and rock crushing quarry. Yet, at the same time, neither Housworth nor Plaintiff applied to DeKalb County to develop the Subject Property as a commercial gravel plant in spite of the fact that Petitioner had received a surface mining permit from the State Department of Natural Resources in 1992.

Sometime in the Fall of 1994, DeKalb Stone resumed the illegal blasting and tried to set up a rock crushing plant without DeKalb County's permission. When this was discovered, DeKalb County quickly stopped this second round of illegal blasting and it halted Plaintiff's efforts to open a gravel plant where none had ever existed. In late December 1994 and in January 1995, Plaintiff was issued three citations for violating the county's ordinances. On December 28, 1994, after receiving the citations, Housworth submitted a development permit for the new business operation on his property. The application included the original 183 acre Subject Property, plus an additional 70 acres.

On February 6, 1995, the DeKalb County Recorder's Court fined Housworth $1,000.00 for illegally expanding a nonconforming use. The Recorders Court also found that Housworth was not entitled to locate or operate heavy equipment on the property, but did not sustain this charge because of a defect in the wording of the citation. On February 8, 1995, DeKalb County advised Housworth to remove any non-permitted equipment or structures from the Subject Property, including the rock crushing equipment. DeKalb County further informed Housworth, consistent with the County Code,

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Reardon, 255 U.S. 271, 41 S.Ct. 255, 65 L.Ed.2d 625 (1920) (enforcement of local ordinance resulting in the demolition of a building constructed in violation of fire code was a matter of local law and not a constitutional violation).

that any expansion of the dimension stone quarry would require the property to be rezoned to the M-2 zoning district. On February 10, 1995, DeKalb County denied Housworth's application for a development permit because it was an expansion of a nonconforming use that was inconsistent with the present zoning classification for the property.

Neither Housworth nor DeKalb Stone sought to appeal the denial of the development permit to either the Board of Appeals, or from the Board of Appeals to the DeKalb County Board of Commissioners. Instead, Housworth challenged the findings of the Recorders' Court by applying for a Writ of Certiorari to the DeKalb County Superior Court. The Writ was sanctioned and the matter had been pending in the DeKalb Superior Court for six (6) months when Housworth voluntarily dismissed the Superior Court action on August 15, 1995. Two days later, Plaintiff DeKalb Stone brought this action in the U.S. District Court.

District Court Denial of Preliminary Injunction:

Plaintiff DeKalb Stone filed the instant action in U.S. District Court asserting a §1983 claim for substantive due process under the Fourteenth Amendment. The complaint also asserted a claim for injunctive relief which asked the Court to prohibit DeKalb County from enforcing its code against Plaintiff's expansion of the nonconforming use.

One month after filing this action, Plaintiff filed a motion for a preliminary injunction seeking to enjoin Defendants from " . . . restricting [or] interfering with . . . " Plaintiff's blasting and crushing operations. The trial Court denied Plaintiff's motion for a preliminary injunction on the grounds, among others, that Plaintiff-Appellant failed to prove a substantial likelihood of success on the merits. In ruling against the Plaintiff's 1995 request for preliminary injunction, the District Court was persuaded, inter alia, by evidence that there are indeed different kinds of quarries and that Plaintiff failed to demonstrate a substantial likelihood of success in showing that the property in question was used for blasting

and crushing rock prior to 1989 (the grant of the legal nonconforming use). *See,* District Court decision, pp. 20 and 22. In denying the request for preliminary injunction, the District Court was also influenced by the fact that the Plaintiff had failed to show substantial likelihood of success on the merits of its claim that the County's decisions were arbitrary or capricious. *See,* District Court decision, pp. 21-22.

Appeal to the Eleventh Circuit Court of Appeals:

Plaintiff appealed the denial of its motion for preliminary injunction. On February 27, 1997, the Eleventh Circuit issued a per curiam decision affirming the District Court's denial of the preliminary injunction, finding no abuse of discretion by the District Court. *DeKalb Stone*, at 960. In addition, the Eleventh Circuit went on to opine that Plaintiff had no substantive due process rights because it had alleged only an executive violation of a state created property right instead of deprivation of a fundamental right. On March 19, 1997, Plaintiff filed a "Petition for Rehearing and Suggestion of Rehearing En Banc". The petition was denied on May 13, 1997.

REASONS FOR DENYING CERTIORARI

1. Declining Certiorari Will Prevent Piecemeal Litigation.

The present matter does not involve fundamental rights protected under substantive due process, but instead, is a local land use case and involves a factual dispute as to what kind of continuous, nonconforming use existed on the property prior to November 8, 1989. On that date, DeKalb County sanctioned a nonconforming use for a quarry which, by all appearances, had only previously been used as a dimension stone quarry. Plaintiff wanted to turn this into a commercial gravel plant in violation of existing zoning ordinances which said a nonconforming use cannot be expanded or enhanced without satisfying existing zoning for the property. To this end, Petitioner applied for a preliminary injunction against DeKalb

County to prevent the County from enforcing its zoning code. The trial Court denied the request for preliminary injunction and this denial was affirmed on appeal by the Eleventh Circuit because it found no abuse of discretion.

That decision should not be disturbed because it is supported by the evidence presented below, and cannot be said to be error. *Synanon Foundation, Inc. v. California*, 444 U.S. 1307, 100 S.Ct. 496, 62 L.Ed.2d 454 (1979) (trial judge's determination of preliminary injunction should be reversed by Supreme Court only when the judge's discretion was improvidently exercised). This petition for certiorari seeks further review of the denial of a motion for preliminary injunction. Therefore, review of this petition for certiorari is not warranted because it could result in multiple appeals and piecemeal litigation since petitioner may still proceed to trial on the merits and prove other facts to potentially change the result of its failed request for injunctive relief.

The Supreme Court has recognized a strong policy against piecemeal litigation, and consistent with that policy, interlocutory review of the grant or denial of a preliminary injunction is disfavored. *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) (review as of right under 28 U.S.C. §1292(a)(1) will be narrowly construed and is available only when litigants challenge an order of serious, perhaps, irreparable consequence). The Supreme Court has observed that review of the grant of a preliminary injunction is, under most circumstances, not a ruling on the merits, *University of Texas v. Camenisch*, 451 U.S. 390, 394-395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981). Perhaps an irreparable injury could be claimed by Petitioner if the trial court exercised its right to consolidate the hearing on the preliminary injunction with a trial on the merits. *Id.*, at 395. However, since that did not happen here, petitioner is not barred from presenting further evidence at the trial of the case, if such evidence exists, to back up its claim for substantive due process violation and permanent injunctive relief because the trial Court's factual findings at the preliminary

injunction stage are not binding at the trial on the merits. *Id.* This petitioner also has no real claim of irreparable harm that would entitle it to further review of the denial of the preliminary injunction because it may continue to operate the dimension stone business it bought since Respondent agrees that operation of the dimension stone quarry is lawful under the nonconforming use. Petitioner may also develop the property in accordance with the existing zoning ordinances for property in the same zoning classification, or it may apply to have the property rezoned.

2. The Eleventh Circuit's Decision is Consistent with This Court's Precedent on Substantive Due Process.

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 898 (1995) and *DeKalb Stone v. County of DeKalb*, 106 F.3d 956 (11th Cir. 1997) are consistent with precedent of this Court and Petitioner has shown no constitutional deprivation of a fundamental right which would justify acceptance of certiorari by this Court.

The Due Process Clause of the Fourteenth Amendment affords protection against deprivation of life, liberty, or property by a state government. This Amendment provides two types of protection: Procedural and Substantive. *Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992). The test for due process is 1) whether the conduct complained of was committed by a person acting under color of state law; 2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 532, 101 S.Ct. 1908, 1911, 68 L.Ed.2d 420 (1981); *Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992) (Under due process, the two issues are whether plaintiff's harm was caused by a constitutional violation, and if so, whether the city is responsible for that violation).

Procedural due process refers to the notion that a person is entitled to notice and an opportunity to be heard, and that the matter be decided by a fair and impartial decision maker. However, the claimant must first pursue any state law remedies before asserting a procedural due process claim in Federal Court.

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. The constitutional violation actionable under §1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided, and whether it was constitutionally adequate.
>
> *Zinermon v. Burch*, 494 U.S. 113, 125-126, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).

Substantive due process, on the other hand, refers to government action that violates fundamental rights and is arbitrary or capricious, i.e., not rationally related to a compelling governmental interest. A substantive due process claim is complete when it occurs, regardless of the procedures provided by the state. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). *Collins v. City of Harker Heights*, 503 U.S. 115, 122, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (substantive due process rights are protected against certain governmental actions regardless of the fairness of the procedures used to implement them).

The analysis applied to a due process claim typically depends on whether the challenged state action is administrative or legislative. Legislative actions are those which usually apply to a larger segment, if not all, of society such as laws, statutes, and regulations. *McKinney v. Pate*, 20 F.3d 1550, 1557 n. 9 (11th Cir. 1994). In contrast, administrative decisions are ministerial or administrative actions of members of

the executive branch of government and these decisions ordinarily apply only to a more limited group, and often only one person. *Id. See e.g., Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. 1 (1979) (executive decision to deny parole). In the context of zoning decisions, "[a]dministrative acts are those that single out specificiable individuals and affect them differently from others," such as the grant or denial of a variance request. 91 Harvard Law Review 1502, 1511 (1978).

When a Fourteenth Amendment claim arises from an administrative act, this typically implicates only procedural due process rights. 91 Harvard Law Review at 1509 (1978). *See e.g., Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (Supreme Court applied procedural due process analysis to policeman's claim that he was wrongly terminated from employment in violation of his due process rights); accord, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) (procedural due process applied to petitioner's claim of a protected property interest in continuing employment). Once it is determined to be a procedural due process claim, a plaintiff may not pursue this claim in federal courts without showing that the state fails to provide an adequate procedural remedy to address this deprivation. *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 983.

Conversely, when the Fourteenth Amendment claim arises from a legislative act, the Supreme Court tends to review it under a substantive due process analysis. For instance, only when analyzing legislative acts has the U.S. Supreme Court required a showing that a State is violating private rights only as necessary to promote legitimate state interests. *See, Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood*, 505 U.S. at 847; *Harrah Ind. School Dist. v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) (Supreme Court examined state rule requiring continuing teacher education for rational relation to state interest).

In the instant case, the Eleventh Circuit was correct in its finding that substantive due process rights are not implicated in the administrative acts of which DeKalb Stone complains. Accordingly, the petition for certiorari should be denied.

A. Substantive Due Process Protects Only Fundamental Rights.

The Court must also determine the nature of the right being asserted. *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972). Not all rights are protectible under the Due Process Clause. Only fundamental rights are entitled to protection. "Fundamental rights" has been defined in various ways by the Supreme Court, but this term is generally understood to mean those rights and liberties which are so firmly rooted in our common history as to be considered fundamental. *Palko v. Connecticut*,[4] 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed.2d 288 (1937) (J. Cardozo) (certain rights are "implicit in the concept of ordered liberty", and therefore are protected from state infringement by the Fourteenth Amendment); Accord, *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952) (J. Frankfurter); *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (1927) (J. Brandeis, concurring) ("[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states"); *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977) (substantive due process protection is reserved for those liberties deeply rooted in this Nation's history and tradition); *U.S. v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (Fifth Amendment substantive due process protects those rights implicit in the concept of ordered Liberty).

Over the years, the Supreme Court has determined that most, but not all, of the rights contained in the Bill of Rights

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[4] Overruled on other grounds in *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

are incorporated into the Fourteenth Amendment, thereby according them the status of "fundamental".[5] The Court has even determined that certain unenumerated rights nonetheless fall within the protective ambit of the Fourteenth Amendment. *See e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. at 847-848, 112 S.Ct. at 2805 ("Liberties" protected include very personal and private decisions of an individual on such topics as marriage; procreation; family relationships; child rearing and education; and contraception even though these liberties are not spelled out in the Constitution or Amendments).

However, the Supreme Court has been careful over the years to point out that the Due Process Clause does not protect all conceivable rights. Indeed, several prior decisions caution great restraint in expanding the list of fundamental rights which are worthy of Fourteenth Amendment protection.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.
>
> *Bowers v. Hardwick*, 478 U.S. at 194-195.

In *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the Supreme Court refused to find that substantive due process guarantees city employees a workplace with minimal levels of safety. In doing so, the Court expressed reluctance to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended

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[5] In footnote 5 of *McKinney v. Pate*, 985 F.2d 1502, *vacated at* 994 F.2d 772 (1993), Chief Circuit Judge Tjoflat provided a compendium of Supreme Court cases showing that most of the Bill of Rights have been incorporated into the substantive due process clause as "fundamental" rights.

and the doctrine of judicial self-restraint requires exercise of the utmost care whenever considering new claims. *Id.*, 503 U.S. at 125, 112 S.Ct. at 1068. In *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003 (1989), the Court ruled that a State's failure to protect a minor child from further parental beatings does not violate any fundamental right or liberty because due process imposes no duty on the state to protect citizens against violence from private sources. This is because the due process clause is written in a way to protect the public by limiting the state's power to act.

Applying these principles to the present case, the issue becomes does a sub-lessee who has a contract right to the use of certain real property for a term of years have a fundamental right to expand a nonconforming use in violation of existing zoning provisions. Respondent can find no authority for such a fundamental right, and indeed, to expand substantive due process to include executive action in applying local zoning law will effectively nullify land use control by local governments. Worse still, federal courts will become the ultimate arbiters of local land use disputes.

B. There Can Be No Claim for Substantive Due Process When a Specific Constitutional Provision Applies.

Consistent with the announced policy of proceeding cautiously when asked to recognize additional "fundamental" rights, this Court has ruled that if the claimed right arises from a specific constitutional provision, then there is no substantive due process claim under the Fourteenth Amendment. *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, the petitioner had been arrested on a charge of selling a substance which looked like an illegal drug. The charge was later dismissed. Petitioner brought suit for substantive due process violation of his right to be free from criminal prosecution except on probable cause. The majority decision found that Albright's claim should have been argued under the Fourth Amendment because substantive due process, with its "scarce

and open ended" guide posts for responsible decision making did not afford relief to Albright. Where a particular Amendment provides an explicit textual source of constitutional protection against a certain type of government behavior, that Amendment and not the more generalized claim of substantive due process, must be used to analyze such a claim. *Id.*, citing *Graham v. Conner*, 490 U.S. 386, 395 (1989). In *Graham*, petitioner brought a substantive due process claim for injuries suffered when detained under an investigatory stop. There, the Court refused to apply a substantive due process analysis to the petitioner's claim, and instead, noted that the Court must identify the specific constitutional right supposedly infringed and use that constitutional standard to judge the claim of excessive force.

Consistent with *Graham v. Connor* and *Albright v. Oliver*, Plaintiff DeKalb Stone has no substantive due process rights because its claim is governed by the Fifth Amendment's Takings Clause. In reality, Plaintiff has brought a takings claim while using the nomenclature of substantive due process. Plaintiff has alleged interference with its anticipated use of real property from the enforcement of a government ordinance which allows nonconforming uses to be continued, but not expanded or enhanced. The Supreme Court has determined that land use restrictions which do not substantially advance legitimate state interests or which deny an owner any economically viable use of his land will effect a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Under the facts of the case, it is easy to understand why Plaintiff has tried to disguise its takings claim as one for substantive due process. Plaintiff does not question the constitutionality of the zoning ordinances. Instead, it merely challenges how the zoning enforcement officer applied the ordinances. Specifically, DeKalb Stone claims that enforcement of the ordinance prevents it from using its property as it desires, i.e. building and operating a rock crushing quarry where none ever existed. Yet, this state action does not

deprive Plaintiff of property nor does it prevent Plaintiff from pursuing the multitude of economic uses for the property under the current zoning. Hence, DeKalb Stone has creatively sought to characterize its claim as something less than a taking, i.e. a substantive due process violation of its right to use the property as it chooses. Such a claim, however, does not amount to deprivation of any right protected under substantive due process because there is no fundamental right "to use property as one chooses" in contravention of local zoning ordinances.

As noted by the Court in *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. 1, 10 (1979), there is a huge " . . . difference between losing what one has and not getting what one wants." (Citations omitted). Likewise, the Court in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) observed that in order to have a protectible due process right,

> . . . a person clearly must have more than an abstract need or desire for [the claimed interest]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.* 408 U.S. at 577.

Further, under the reasoning of *Graham* and *Albright*, the Court must look at the nature of the underlying claim and apply the applicable constitutional provision, where it exists, instead of applying the more general substantive due process analysis.

The decisions in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 120 L.Ed.2d 304 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) do not compel a contrary result. Each of these cases involved a physical taking when the State governing body required the owners to surrender a portion of their property for public use as a condition of granting their respective building permits. In each case, the Supreme Court found an uncompensated taking when the requirement to dedicate land was not reasonably related to the development at hand.

Here, in contrast, there has been no taking of property from DeKalb Stone and there has been no requirement imposed on DeKalb Stone that it dedicate any portion of its leasehold property for a public use. Instead, DeKalb County has merely enforced its existing land use ordinances to prohibit an illegal expansion of a nonconforming use and thereby prevent DeKalb Stone from building a surface mine and rock crushing quarry where none ever existed. These ordinances pre-existed DeKalb Stone's sub-lease of the land and they do not prevent DeKalb Stone from continuing the nonconforming use which was granted, nor do they prevent DeKalb Stone from using the land as allowed under the existing zoning for the property. Thus, even when viewed under the takings clause as required by *Graham* and *Albright*, Plaintiff has still failed to state a claim.

There is yet another reason why Plaintiff has cast its claim under substantive due process rather than as a taking. That is because in doing so, Plaintiff can avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985) (Fifth Amendment is not violated by government taking of property, but only by such taking without compensation. Hence, a Fifth Amendment takings claim is not ripe until plaintiff has been denied compensation by state). Here, Plaintiff is attempting to pursue an unripe takings claim before it has first sought compensation through the courts of Georgia. This Court should therefore deny certiorari at this time.

C. Substantive due process Does Not Protect Property Interests Arising Under State Law.

Another such area where the Supreme Court has not extended Substantive due process protection is when the alleged substantive right arises from state law only. *See e.g., Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). In *Bishop*, a police officer claimed to have been discharged from employment based on deliberate lies of a city manager. The Court first looked at North Carolina law and found that the Police Officer had no property right protected by the Fourteenth Amendment. The Court wrote that even if this allegation (being fired based upon lies) was true, it might provide a basis for a state law tort claim, but that

> "[t]he federal court is not the proper forum in which to review the multitude of personnel decisions that are made daily by public agencies. . . . The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions." *Id.*, at 349-350, 96 S.Ct. 2080.

Nine years later, the Supreme Court decided a similar case in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). There, the Supreme Court found that the petitioners, unlike the policeman in Bishop, did have a property right in continued employment. Yet, even after finding a property right arising under state law, which was taken from petitioner by administrative action when he was fired, the Supreme Court found that petitioners were entitled to procedural due process protection for this right, not substantive due process. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell J., concurring) ("[S]ubstantive due process rights are created only by the Constitution.").

The Court has also held that claims arising under state tort law are not entitled to substantive due process protection under the Fourteenth Amendment. This is because the Constitution was not intended to supplant traditional tort law. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665,

88 L.Ed.2d 662 (1986) (Prisoner who tripped over pillow negligently left on stairs by deputy does not have a claim for Due Process deprivation of life, liberty or property). *Collins v. City of Harker Heights*, 503 U.S. at 125 (The due process clause does not transform every tort committed by a state actor into a constitutional violation).

Property rights arise under state law. *Board of Regents v. Roth*, 408 U.S. at 577. In this regard, land use rights are a species of those state created property rights. Given this fact, the Eleventh Circuit first assumed, without deciding, that Plaintiff was asserting a protected property interest. *DeKalb*, 106 F.3d at 959, n. 5. The Eleventh Circuit then determined that the state action complained of here – enforcement of existing zoning regulations which prohibit expansion of non-conforming uses – was an administrative executive action instead of a legislative action. As such, the Eleventh Circuit then framed the issue as to " . . . whether a substantive due process cause of action exists where an executive actor deprived Appellant of a state-created property right." *Id.* at 990.

The Eleventh Circuit concluded that such allegation implicated only procedural due process instead of substantive due process, relying upon *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985); and, *Bishop v. Wood*, 426 U.S. 341, 349-350, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) for this conclusion. As shown above, these are all cases where a plaintiff claimed a deprivation of a state created property interest (i.e. continued employment) as a result of administrative actions (i.e. termination from employment). In each of those cases, the Supreme Court applied a procedural due process analysis instead of substantive due process[6]

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[6] Contra, *Harrah Ind. School Dist. v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) (even though decision to fire petitioner was an executive action, and presumably would trigger procedural due process

because each plaintiff claimed a wrongful deprivation of a state created property interest. This result makes sense because "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978). Hence, the decision in *DeKalb Stone v. County of DeKalb County* is consistent with existing precedent of this Court as this petitioner is alleging a wrongful deprivation of a state created property interest and such claim should be addressed, if at all, under procedural due process instead of substantive due process.

3. Emerging Caselaw From Other Circuits Supports Eleventh Circuit's Decision in DeKalb v. DeKalb Stone.

Although Petitioner characterizes the Eleventh Circuit as being all alone in ruling that state created property rights are not protectible under substantive due process, a review of the cases cited by Petitioner shows an emerging trend in other circuits consistent with this premise and away from expanding substantive due process rights pursuant to cautionary instruction from this Court.

First Circuit

In *Ortiz De Arroyo v. Barcelo*, 765 F.2d 275 (1st Cir. 1985) a substantive due process claim was allowed to survive a motion to dismiss because it contained an allegation that the governmental action amounted to a taking without compensation. This is not inconsistent with the Eleventh Circuit's decision because the protection against uncompensated takings is fundamental under the

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analysis, Supreme Court applied substantive due process analysis because it chose to analyze the rule itself for rational relation to state interest). In the instant case, there has been no challenge to the rule itself, only to the application of that rule by an executive actor.

Fifth Amendment and is made applicable to the states under the Fourteenth Amendment.

More recently, the First Circuit found no such substantive due process claim in a case which did not implicate the takings clause. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1990) (rejections of development permits do not ordinarily implicate substantive due process).

Second Circuit

At one point, the Second Circuit seemed willing to recognize a substantive due process claim from deprivation of a state created property interest, but has issued more recent decisions which do not recognize such a claim.

In *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) the Second Circuit stated that denial of a certificate of occupancy might be actionable under substantive due process, especially under circumstances where the owner produced some evidence to show that the property had been zoned, and actually used, as commercial property before he acquired it. *Id.*, at 212-213. Yet, a year later, the Second Circuit rejected a developer's substantive due process claim, finding that he did not have a property interest protectible under due process to receive a building permit for the second stage of a building renovation. *See, RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918-919 (2d Cir. 1989). Most recently, the Second Circuit ruled that a landowner did not have a constitutionally protected property interest under substantive due process to compel an insulation inspection that the city inspector refused to perform. *Zahra v. Town of Southold*, 48 F.3d 674, 681 (2d Cir. 1994).

Third Circuit

In 1994, the Third Circuit did recognize a substantive due process claim arising from the arbitrary or irrational denial of a request for variance. *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir.

1994). However, in doing so, the *DeBlasio* court expressed reluctance to afford substantive due process protection to state created property rights because it could find no clear precedent from the U. S. Supreme Court. *Id.*, at 598. It also noted that not all property interests protected under procedural due process are worthy of protection under substantive due process. *Id.* Finally, the Third Circuit agreed that the concept of substantive due process protects only fundamental property interests. *Id.*, at 599.

Fourth Circuit

The Fourth Circuit's decisions are consistent with the Eleventh Circuit's in the area of substantive due process. In *Gardner v. City of Baltimore*, 969 F.2d 63 (4th Cir. 1992), the Fourth Circuit determined that a disappointed developer had no property interest worthy of Fourteenth Amendment protection under substantive due process. To reach this decision, the Fourth Circuit looked to see whether the developer had a legitimate claim of entitlement to the proposed development, and rejected the claim when it determined that the decision maker had been vested with discretion to approve or reject such proposals. *Id.*, at 64. The Court went on to note that routine land use disputes are simply not the business of the federal courts (*Id.*, at 67) and that 42 U.S.C. §1983 does not constitutionalize every run of the mill dispute between a developer and a town planning agency. *Id.*, at 68.

Fifth Circuit

Earlier decisions of the Fifth Circuit would seem to recognize a substantive due process claim from deprivation of a state created property interest. *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987) (summary judgment for defendants reversed because material issues of fact existed whether professor's substantive due process rights were violated when he was fired and professor asserted claim of tenure).

However, a more recent decision casts doubt on this point. *See, Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290 (5th Cir. 1993). (Fifth Circuit affirmed finding on the merits against tenured professor's claims of substantive due process violation from a forced salary reduction). Additionally, in another decision, the Fifth Circuit analyzed a state created property claim (continued employment) under a procedural due process analysis. *Schaper v. City of Huntsville*, 813 F.2d 709, 716-717 (5th Cir. 1987) (fired police chief failed to state a claim for substantive due process violation where, inter alia, the right violated arose from city personnel policies rather than from Federal Constitution).

Sixth Circuit

In a case decided before this Court's opinions in *Graham v. Conner* and *Albright v. Oliver*, the Sixth Circuit recognized that substantive due process protects specific fundamental rights, which are those implicit in the concept of ordered liberty. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). There, a female professor claimed equal protection and substantive due process violation from alleged denial of tenure solely on the basis of gender. The case went to trial and the jury found that two defendants had violated her equal protection and substantive due process rights. Even though her equal protection claim later failed, the Sixth Circuit deemed her to have a property interest in not being terminated from a state job for a constitutionally impermissible purpose, i.e. on the basis of her gender. *Id.*, at 1329. Were this case decided today, *Graham* and *Albright* would require that the case be evaluated under Title VII instead of substantive due process, and there is no reason to think the Sixth Circuit would ignore this controlling authority.

Seventh Circuit

The Seventh Circuit has issued mixed signals on whether state created property rights are worthy of substantive due process protection. In *Clark v. County of Winnebago*, 817 F.2d 402 (7th Cir. 1987) the plaintiff lost at trial on his claim that the denial of his rezoning request violated his due process rights. The Seventh Circuit affirmed the trial Court's rulings because the County's zoning law was not so arbitrary as to violate due process and the law as applied to plaintiff did not do so either. In both instances, Plaintiff failed to overcome the presumption of validity for the ordinance itself (*Id.* at 408-409) and the presumption of validity of the specific zoning decision (*Id.* at 409). In reaching this decision, the Seventh Circuit noted that " . . . as long as there is room for disagreement, the local zoning decision must control." *Id.* at 409, citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

In contrast, in *Kauth v. Hartford Insurance Company of Illinois*, 852 F.2d 951 (7th Cir. 1988) an allegation of unreasonable deprivation of a state created property interest was deemed insufficient to state a substantive due process claim under Supreme Court precedent. In reaching this decision, the Seventh Circuit noted that most Supreme Court decisions on substantive due process involve some fundamental right that is categorized as a liberty interest. *Id.* at 956. It further noted that there is no Supreme Court precedent which holds that mere deprivation of a property interest is sufficient to state a substantive due process claim. *Id.* at 957. Because Kauth did not allege that defendants violated any substantive provision of the Constitution, he has failed to state a claim for substantive due process. *Id.* at 958.

In *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989), the Seventh Circuit found a substantive due process claim to exist where the property owner alleged that the denial of a certificate of occupancy prevented him from using his property for any purpose. *Id.*, at 557. In reaching this decision, the Court noted that in order to have a substantive due process claim based on deprivation of a state created property interest, the

claimant must also have a violation of some other substantive constitutional right or show state law remedies to be inadequate. *Id.*, at 558. However, the Seventh Circuit went on to find an exception in local land use cases, finding that such a property interest may invoke the substantive due process protection. *Id.* This last reasoning is unfortunate and unnecessary since the denial of the certificate of occupancy could easily have been analyzed as a takings claim if it prevented the owner from using his property for any purpose. *See, Agins*, 447 U.S. at 260 (taking occurs when landowner is deprived of all economic use of property).

Eighth Circuit

In the only case cited by the petitioner, the Eighth Circuit's ruling is consistent with the proposition that only fundamental rights are protected under the substantive due process clause. In *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) the Court ruled that the landowner had a viable substantive due process claim when unconstitutional conditions were placed on his request for a building permit. Specifically, the landowners claimed that the city conditioned the issuance of the permit upon a conveyance of land to private parties for a nonpublic purpose. *Id.* On these allegations, the Eighth Circuit found that the plaintiffs stated a substantive due process claim. *Id.*, at 607. Even though this decision predated *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*, its reasoning is perfectly consistent with those decisions. Those cases stand for the proposition that it is a taking of property for the government to condition the issuance of a permit upon a requirement that the applicant dedicate a portion of his property for purposes unrelated to the proposed development.[7]

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[7] However, in light of *Graham v. Connor*, the *Littlefield* decision, if rendered now, would in all likelihood be decided on the takings theory rather than under substantive due process.

Ninth Circuit

In two very recent decisions, the Ninth Circuit has made its own advances in the area of substantive due process which are consistent with this Court's precedents. In *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997) the property owners' application to subdivide land was denied and they brought claims for inverse condemnation and substantive due process. The Ninth Circuit, relying on its decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) held that plaintiffs' claim was really in the nature of a taking, and as such, could not be brought under the substantive due process clause because the Fifth Amendment provided an explicit source of constitutional protection for this claim. *Macri*, at 1499-1500. The Ninth Circuit was compelled to reach this decision by *Graham v. Connor* which provides that if there is an explicit source of constitutional protection against the challenged governmental conduct, substantive due process does not apply. *Id.*, at 1500. The Ninth Circuit also relied on *Dolan v. City of Tigard*, 512 U.S. 374, 383-385 (1994) for the premise that the Fifth amendment takings clause applied to the states through the Fourteenth Amendment, and the Ninth Circuit thereby rejected the suggestion that the case was actually grounded in substantive due process. *Macri*, at 1500.

Tenth Circuit

In the only Tenth Circuit decision cited by petitioner, the Court never reached the question of whether state created property interests are cognizable under the substantive due process clause. *Landmark Land Company of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) (Dismissal of complaint on ripeness grounds was affirmed since the developer had not shown final, definitive decision from the county on his development plan).

D.C. Circuit Court of Appeals

In *Shenk v. Zoning Commission of the District of Columbia*, 440 F.2d 295 (D.C. Cir. 1971) the Court perhaps implicitly recognized a substantive due process claim from the arbitrary denial of plaintiff's rezoning request. However, this conclusion is by no means incontestable because nowhere in the decision does the Court address the origin of the right at issue in the claim. Even if we assume that this case involved a substantive due process claim, the case is still of little precedential value since it predated several critical decisions of the Supreme Court in this area of due process such as *Board of Regents v. Roth*, *Graham v. Connor*, *Albright v. Oliver*, and *Bishop v. Wood*.

CONCLUSION

DeKalb Stone's Petition for Certiorari should be denied because further review of the denial of the preliminary injunction will result in piecemeal litigation. Certiorari should also be denied since the Eleventh Circuit's decision below is consistent with this Court's precedent because substantive due process protects only fundamental rights and there can be no claim for substantive due process when a specific constitutional provision applies. Finally, certiorari should be declined because emerging caselaw from other Circuits is consistent with this Court's precedent and the Eleventh Circuit's decision below.

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In the

Supreme Court of the United States

October Term, 1996

DEKALB STONE, INC.,

Petitioner,

v.

DEKALB COUNTY, GEORGIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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RULE 29.6 STATEMENT

Petitioner hereby incorporates the Rule 29.6 listing in the Petition for Certiorari.

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ARGUMENT

Respondents' brief in opposition confirms that certiorari should be granted in this case. Respondents essentially concede both that the Circuits are split on the question presented and, ultimately, that the decision below was in error. Because this case involves a recurring and fundamental question on which the Courts of Appeals are divided and because the decision below conflicts not only with decisions of the other Circuits but with well-established decisions of this Court, decisions that respondents have not even attempted to address, certiorari should be granted.

1. The question of whether a substantive due process cause of action is stated by an allegation that an executive action wrought an arbitrary restriction on the use of property is squarely presented here.

The centerpiece of respondents' first argument that certiorari should be denied is to misread the decision rendered below. It is not the case, as respondents would have it, see Respondents' Response to Petition for Writ of Certiorari ("Opp. Cert.") 10, that the Court of Appeals's decision was based on a bald assertion that the district court committed no abuse of discretion and that the Court of Appeals then "in addition" merely "went on to opine" that petitioner had failed to state a claim. *Id.* Failure to state a claim was the sole basis for the Court of Appeals's conclusion that the district court's denial of a preliminary injunction should be affirmed.

The Court of Appeals assumed that a protected property interest is implicated in this case, Appendix to Petition for Certiorari ("App.") 6a n.5 — as it is, see Petition for Certiorari ("Cert. Pet.") 15 — and it accepted as true petitioner's allegation that respondents deprived petitioner of that interest by "arbitrary and capricious" action. See App. 6a. It then held that the district court's decision to deny the preliminary injunction was not an abuse of discretion — was not, that is, reversible error — solely on the basis that "the cause of action pled by [petitioner] does not exist; therefore, [petitioner] cannot show a substantial likelihood of success on the merits. The district court properly denied the motion for preliminary injunction." App. 8a-9a.

The question of whether an allegation that executive action arbitrarily deprived an individual of a protected interest in real property states a cause of action under the Due Process Clause of the Fourteenth Amendment (or, presumably, of the Fifth Amendment in

a case involving federal action) is therefore squarely and inescapably presented in this case. It is, indeed, the only question presented by the decision below. The Court of Appeals's opinion is neither long nor complicated, and this Court can clearly see for itself — in black and white at pages 5a-9a of the Appendix to the Petition for Certiorari — that the primary basis urged by respondents for denying review here is grounded on nothing more than a mischaracterization of the Court of Appeals's opinion.

2. **This case is not "interlocutory" in any sense that counsels against review on certiorari.**

Respondents' next argument is related to the first. Respondents represent to this Court that petitioner can somehow "proceed to trial on the merits and prove other facts to potentially change the result of its failed request for injunctive relief." Opp. Cert. 11. That is, they suggest that this is merely an interlocutory appeal, and that, because petitioner may yet win below, review by this Court is not necessary now.

Respondents do not — presumably because they cannot — explain what "facts" petitioners might prove to prevail on remand from the Court of Appeals decision when the Court of Appeals has held that an allegation of arbitrary deprivation of property is *not sufficient to state a claim upon which relief can be granted.* Although the interlocutory procedural posture of a case may counsel against a grant of certiorari where further proceedings may obviate the need for review by eliminating the basis for petitioner's dissatisfaction with the ruling of the Court of Appeals, this case is *not* interlocutory in that sense: since the Court of Appeals based its decision on failure to state a claim, the substantive due process claim is for all practical purposes at an end if certiorari is denied.

Respondents suggest that granting certiorari will result in "piecemeal litigation" and "could result in multiple appeals." Opp. Cert. 11. This is untrue. Because the Court of Appeals held that petitioner failed to state a claim, the actual misuse of judicial resources through wasteful multiple appeals would come if this Court were to deny certiorari in order to permit a remand to the district court for dismissal of the action. In that event, petitioner would be required to appeal anew to the Eleventh Circuit and to seek certiorari again from that court's affirmance of the district

court's dismissal, forcing both the Court of Appeals and this Court needlessly to address twice the issue — whether or not petitioner has stated a claim upon which relief can be granted — that is already cleanly presented in the instant Petition.

3. **Disputed factual questions that have not been addressed below do not provide an appropriate basis for denying review.**

The Court of Appeals has held that, unlike a similarly situated plaintiff in another Circuit, petitioner is not entitled to a trial at which it can attempt to demonstrate the truth of its allegations that respondents have acted arbitrarily to deprive it of its interest in the use of the real property that is the subject of this case. Yet respondents devote much of their brief in opposition to contesting what they themselves describe as a "factual dispute," Opp. Cert. 10, that was not resolved below. Since petitioners' very complaint is that their lawsuit has been cut short by the Court of Appeals's conclusion that an arbitrary executive restriction of an individual's use of his property can *never* violate substantive due process, nothing could be less relevant. Respondents cannot avoid review of the question of whether petitioner is entitled to try to prove its case by arguing that they are correct about the very disputed issues petitioner has been denied the right to litigate.

Respondents contend before this Court that the only nonconforming use of the subject property permitted by the DeKalb County Board of Appeals was the operation of a "dimension stone quarry." See Opp. Cert. 10. Respondents go so far as to characterize petitioner's use of the land as a quarry including blasting and rock crushing as "illegal." See, *e.g.*, *id.* at 2, 5, 7. Indeed, many of their arguments proceed as though the scope of the approved non-conforming use had been established at trial. See, *e.g.*, *id.* at 17 (arguing that the case involves only the question whether there is a constitutional right to expand a non-conforming use of property); *id.* at 6.

The significance of respondents' contention is that, if it were true, and if respondents had believed it to be true at all times since the Board acted, it would follow that their enforcement actions against petitioner's attempts at blasting and rock crushing on the property at issue here would not have been unconstitutionally

arbitrary. The allegations of petitioner's complaint, of course, are that the nonconforming use was *not* so limited, and that the enforcement actions taken by respondents were instead taken arbitrarily, capriciously, without rational basis, and, in some instances, willfully for partisan, political or personal reasons. Cert. Pet. 6-7; see also *id.* at 5-6 (Recorder's Court decision characterizes the non-conforming use to include "blasting and rock crushing").

If after a trial respondents are found to be correct in their tendentious characterization of the Board of Appeals's decision (and if they are shown to have understood the decision contemporaneously in the way they now claim, and to have based their enforcement actions on that understanding), then petitioner will have failed to carry its burden to prove that respondents' enforcement actions were arbitrary. But the contested questions raised by respondents are obviously irrelevant at this stage of the proceedings. The Court of Appeals's decision has deprived petitioner of the very right to prove that respondents' actions were constitutionally arbitrary — that is, to prove that the Board of Appeals's decision was not restricted to any particular type of quarrying and that respondents abused their power by nonetheless taking arbitrary enforcement action against petitioner's lawful quarrying activity — a right that petitioner would have had had it brought this suit in virtually any other Circuit in the United States.

4. **Respondents ultimately do not even argue that the decision below is correct.**

On the merits, respondents do not even consistently attempt to defend the holding of the Court of Appeals that executive action depriving an individual arbitrarily of state-created property rights can never violate substantive due process. Of course, in light of the significant Circuit conflict on that basic issue, review would be appropriate even if the decision below were correct. But respondents' own brief makes clear that this is not a case where this Court can conclude that the Court of Appeals was correct and that, therefore, it might be better to wait for a different case implicating the split — one that holds that an allegation of arbitrariness *does* state a claim — before granting review.

a. On the merits, respondents seem to agree with us that an allegation of executive arbitrariness *can* state a claim under

substantive due process. The most they say, citing an article in the Harvard Law Review, is that "[w]hen a Fourteenth Amendment claim arises from an administrative act, this *typically* implicates only procedural due process rights." Opp. Cert. 14 (citing "Developments in the Law — Zoning," 91 Harv. L. Rev. 1427, 1509 (1978)). Respondents do not claim that an administrative act *cannot* implicate substantive due process, nor do they come to terms with — or even address — this Court's decisions evaluating administrative action to ensure that it does not arbitrarily deny life, liberty or property. See, *e.g.*, Cert. Pet. 17-18 (citing cases). The article they cite does not suggest, as the Court of Appeals held, that administrative acts affecting property can never violate substantive due process. Indeed, that article explicitly acknowledges the substantive "constraint imposed by due process — that zoning measures be substantially related to 'public health, safety, morals, or general welfare.'" 91 Harv. L. Rev. at 1502 (quoting *Euclid* v. *Ambler Realty*, 272 U.S. 365, 395 (1926)).

Respondents say that "[c]onversely, when the Fourteenth Amendment claim arises from a legislative act, the Supreme Court *tends* to review it under substantive due process analysis." Opp. Cert. 14 (emphasis added). They also cite a number of cases in which land use decisions were evaluated for consistency with procedural due process and argue the *non sequitur* that only procedural due process analysis is appropriate in such cases. See *id.* at 14; see also *id.* at 22-23.

But under the American system of justice, courts do not distill the Platonic essence of the facts alleged in a lawsuit so as to discern the typical, and hence appropriate, legal claim into which the facts fit. Rather, courts address the claims actually made by the adverse parties before them. The fact that land use disputes most often give rise to claims of procedural irregularity surely does not imply that they may never give rise to claims of substantive impermissibility. And this Court's decisions, with the decisions of all the lower courts save the Eleventh Circuit, make clear that there is no such limitation on the scope of arbitrariness review under the Due Process Clause.

b. Respondents also argue that there can be no substantive due process claim here, because "the claimed right arises from a specific constitutional provision," Opp. Cert. 17 (citing *Albright* v. *Oliver*, 510 U.S. 266 (1994) (plurality opinion), and *Graham* v. *Connor*,

490 U.S. 386 (1989)) — the Takings Clause of the Fifth Amendment made applicable to the States through the Due Process Clause of the Fourteenth Amendment. In this they appear to urge the theory put forward by the Ninth Circuit in its recent decision in *Armendariz* v. *Penman*, 75 F. 3d 1311 (9th Cir. 1996) (en banc), a theory that conflicts with both the decision below *and* with the approach taken by all the other Circuits. See Cert. Pet. 28. Thus even if this theory were correct, it would counsel in favor of, not against, a grant of certiorari here.

In any event, it is not correct. The plurality opinion in *Albright* and the opinion of the Court in *Graham* are inapplicable because petitioner does not seek to "'expand'" the scope of substantive due process. *Albright*, 510 U.S. at 271 (plurality opinion) (citation omitted); see also *id.* at 281 (Ginsburg, J., concurring) (declining to "'break new ground'" in the substantive due process area because "the Fourth Amendment proscribes the . . . misconduct . . . allege[d]") (citation omitted). As this Court's decisions make clear, the cause of action brought by petitioner is hardly new. Indeed, it has long been recognized by this Court that substantive due process and takings challenges to land-use decisions comfortably complement each other. See, *e.g.*, *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 835 n.3 (1987).

Indeed, respondents' novel theory — which would apply to bar substantive due process challenges to both executive *and* legislative action limiting the use of property — would lead to the absurd and unprecedented result that an individual could not challenge any regulation of or restriction on the use of property as arbitrary and irrational if it came *close* to violating (or did violate) the Takings Clause (for example, because of a colorable claim that the restriction lacks any public purpose or the necessary provision for just compensation), in which case *only* a takings challenge would be entertained.[1] An arbitrariness challenge would lie, however, against

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[1] Perhaps substantive due process would vanish only where a takings claim was actually *stated*. Whether *Albright* and *Graham* can apply where the claimed due process right would not be *redundant* of another explicit constitutional right remains at best an open question. See *Albright*, 510 U.S. at 281 (Ginsburg, J., concurring); see also *id.* at 287-289 (Souter, J., concurring in judgment).

any regulation or restriction that didn't even come close to being a taking! Yet of course this Court has routinely evaluated all manner of restrictions on property for substantive conformity with the Constitution under the Due Process Clause without regard to the Takings Clause, and indeed has done so even after the decisions in *Albright* and *Graham*. See, *e.g.*, *Bennis* v. *Michigan*, 116 S.Ct. 994, 998 (1996); *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 636-641, 641-647 (1993) (addressing substantive challenges under *both* the Due Process Clause and the Takings Clause).

In addition, as this Court made clear just this year, respondents are wrong in saying, see Opp. Cert. 20, that petitioner's claim would not be ripe if construed as an incorporated Takings Clause claim under the Due Process Clause of the Fourteenth Amendment. See *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1667 (1997). Contrary to respondents' contention, therefore, petitioner would have *no* reason in this case to "disguise," Opp. Cert. 18, what should have been brought as a takings claim.

c. Respondents next contend that only "fundamental rights" are protected under substantive due process, and that "property interests arising under state law" are *not* so protected.

As to the former proposition, see Opp. Cert. 15-17, respondents are wrong if they think that the doctrine that limits the application of heightened judicial scrutiny to "fundamental" or "protected" interests somehow limits the longstanding constitutional principle that *no* infringement of life, liberty or property will be permissible if it is irrational or arbitrary. See Cert. Pet. 10. Again, they do not address the long line of Supreme Court authority on this point cited in the Petition. See *id.* at 10-13.

As to respondents' latter claim, see Opp. Cert. 21-23, the text of the Constitution itself — in providing protection of "property" on an equal footing with "life" and "liberty" — demonstrates that it is insupportable. Respondents do not address the cases cited in the Petition that demonstrate that property interests created by state law are protected by substantive due process. See Cert. Pet. 13-15. And a line of cases from *Nollan* to *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), to *Dolan* v. *City of Tygard*, 512 U.S. 374 (1994), has made unmistakably clear that the right to own, possess, and use one's property is no longer to be treated as the

"poor relation" of American constitutional law. See *Dolan*, 512 U.S. at 392.

d. Finally, respondents seem to suggest that petitioner seeks to constitutionalize the multitude of land-use decisions made by local governments. See, *e.g.*, Opp. Cert. 1-2, 10, 21. This is simply not the case. As the very small number of successful arbitrariness claims reported from the Courts of Appeals makes clear, the standard of constitutional arbitrariness is a stringent one — and, under the appropriate standard, merely erroneous or ill-advised land-use decisions will not be held to violate the Constitution. Nonetheless, under this Court's decisions, petitioner is entitled to attempt to prove its allegations that respondents' enforcement actions were taken arbitrarily, capriciously and without any rational basis.

5. **Respondents concede there is a Circuit split, and their allegation that there is a body of "emerging caselaw" consistent with the decision below is plainly wrong.**

As this Court can see, respondents address only a handful of the conflicting Court of Appeals cases cited in the Petition for Certiorari.

To begin with, in an attempt to persuade this Court not to grant certiorari at this time, respondents argue that there is a body of "emerging caselaw," Opp. Cert. 30, that is consistent with the decision below. Their suggestion seems to be that this Court should stay its hand to permit evolution in the Circuits toward uniform acceptance of the Eleventh Circuit's wayward view.

There is nothing to this plea. The many cases cited by petitioner demolish this claim and, indeed, respondents themselves cite recent cases from several Circuits that flatly conflict with the decision below. To give just the most obvious example, they cite a 1995 Third Circuit decision recognizing a substantive due process cause of action for an arbitrary denial of a request for a zoning variance — a decision that was rendered *after* the Eleventh Circuit's decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 898 (1995). See Opp. Cert. 24 (citing *DeBlasio* v. *Zoning Board of Adjustment for the Township of West Amwell*, 53 F. 3d 592 (3d Cir. 1995)). This alone would be sufficient to put to rest the claim of an "emerging trend," Opp. Cert. 23, that might militate in favor of this Court staying its hand. In point of fact, far from announcing a rule that has been embraced or

adopted by other courts, *McKinney* has not been followed by *any* other Circuit in the years since it was decided.

And indeed, although they scratch only the surface of the case law cited in the Petition, respondents do acknowledge, as they must, that the Circuits are divided. In addition to the Third Circuit, they acknowledge that decisions from the Second, Fifth, Seventh and D.C. Circuits conflict with the decision of the Eleventh Circuit below. See Opp. Cert. at 24 (citing *Brady* v. *Colchester*, 863 F.2d 205 (2d Cir. 1988)); *id.* at 25 (citing *Honore* v. *Douglas*, 833 F.2d 565 (5th Cir. 1987)); *id.* at 27 (citing *Polenz* v. *Parrott*, 883 F.2d 551 (7th Cir. 1989)); *id.* at 30 (citing *Shenk* v. *Zoning Comm'n of the District of Columbia*, 440 F2d 295 (D.C. Cir. 1971)). Respondents do not even address the Fourth Circuit's decision in *Scott* v. *Greenville County*, 716 F.2d 409 (4th Cir. 1983), see Cert. Pet. 25, which also conflicts with the decision below.

They do attempt unavailingly to distinguish some of the decisions of several of the other Circuits. With respect to the Sixth Circuit, they acknowledge that *Gutzviller* v. *Fenik*, 860 F.2d 1317 (6th Cir. 1988), conflicts with the decision below, but argue that after *Albright* and *Graham*, it would have to be decided under Title VII. Opp. Cert. 26. Of course neither *Albright* nor *Graham* remotely suggests that the availability of a statutory remedy has any bearing on the availability of a substantive due process cause of action. But in any event, regardless of whether a case presenting the facts of *Gutzwiller* could or should be decided on another ground today, the case would still stand for the proposition — one that has never been retreated from in any way — that an arbitrary deprivation of a state-created property right states a substantive due process claim in the Sixth Circuit. And indeed, respondents do not even address the other Sixth Circuit decision cited in the Petition, *Wilkerson* v. *Johnson*, 699 F.2d 325 (6th Cir. 1983), see Cert. Pet. 26, which *also* conflicts with the decision below.

Respondents similarly attempt to recharacterize the decisions of the First Circuit in *Ortiz De Arroyo* v. *Barcelo*, 765 F. 2d 275 (1st Cir. 1985), and the Eighth Circuit in *Littlefield* v. *City of Afton*, 785 F.2d 596 (8th Cir. 1986), as Taking Clause cases. But the Courts of Appeals in those cases did not treat them as such. Rather, they recognized in those cases the availability of the very cause of action the Eleventh Circuit held was not available here. And again,

respondents do not address the First Circuit's decision in *Roy* v. *City of Augusta*, 712 F. 2d 1517 (1st Cir. 1983), see Cert. Pet. 21, which also conflicts with the decision below.

With respect to the First, Second, Fourth and Fifth Circuits, respondents also attempt to argue that the existence of decisions reporting unsuccessful substantive due process challenges somehow undermines the conflict between those Circuits and the Eleventh Circuit, and somehow renders the law in those Circuits "consistent" with the decision below. See, *e.g.*, Opp. Cert. 25. But none of the cases they cite calls into question the continued viability of the cause of action for arbitrary deprivation of a state-created property interest. Indeed, *each of them* explicitly reaffirms its availability. See *PFZ Properties* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991); *Zahra* v. *Town of Southold*, 48 F.3d 674, 679-682 (2d Cir. 1995); *RRI Realty Corp.* v. *Village of Southampton*, 870 F.2d 911, 914-918 (2d Cir. 1989); *Gardner* v. *City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992); *Williams* v. *Texas Tech University Health Sciences Center*, 6 F.3d 290, 294 (5th Cir. 1993).

With respect to the Third, Seventh and D.C. Circuits, respondents don't even have any such cases on which to rely. With respect to the Seventh Circuit, respondents do not argue that the cause of action has not been recognized or has been undermined, but only that *Polenz* was "unfortunate and unnecessary." Opp. Cert. 28. They do not address the decision in *Clark* v. *Winnebago County*, 817 F.2d 407, 408-409 (7th Cir. 1987), which also conflicts with the decision below. With respect to the D.C. Circuit, they assert, without any support, that *Shenk* might come out differently if that Court of Appeals were called upon to decide it again. Opp. Cert. 30. They make no argument at all with respect to the Third Circuit, and, similarly, address only one of the several Third Circuit cases cited in the Petition that conflict with the decision below.

CONCLUSION

This case presents an ideal vehicle for addressing the persistent split among the Courts of Appeals, a split with respect to which at least two of the Courts of Appeals have explicitly asked for Supreme Court guidance on a matter of obviously fundamental constitutional import. See Cert. Pet. 24 n. 8 (Third Circuit), 26-27 (Seventh Circuit). Certiorari should be granted.

Respectfully submitted,

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